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No. 92-7549

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS N. SCHIRO,

Petitioner,

v

RICHARD CLARK, Superintendent,
Indiana State Prison, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Whether *Green v. United States*, 355 U.S. 184 (1957) and *Bullington v. Missouri*, 451 U.S. 430 (1981) can be extended to preclude, as a matter of double jeopardy or collateral estoppel, sentencing which relies in part on conduct which was alleged in a count charging knowing murder, where the jury found the defendant guilty of felony murder but did not decide the knowing murder count.

Whether, where the evidence showed that the defendant killed the victim so she could not report that he had raped her, the arguments and jury instructions did not present the "lack of intent" theory defendant now claims formed the basis for the verdict but told the jury to return only one verdict, and the state court found that the jury simply "chose not to consider" the knowing murder count, the jury's verdict that petitioner was guilty of felony murder can reasonably be viewed as an "implied acquittal" or other determination that defendant did not intentionally kill the victim.

Whether petitioner's proposed expansion of *Green* and *Bullington* constitutes a "new rule" that cannot form the basis of federal habeas corpus relief under *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny.

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BRIEF OF RESPONDENTS

JURISDICTIONAL STATEMENT

Respondents continue to believe that the petition for writ of certiorari was jurisdictionally out of time for the reasons stated at pages 7 through 9 of their Brief in Opposition to Petition for Writ of Certiorari. In all other respects, petitioner's jurisdictional statement is substantially accurate.

STATEMENT

On the evening of February 4, 1981, Petitioner Thomas N. Schiro gained entry to the home of Laura Luebbehusen on the pretext that he needed to use the telephone because he had car trouble. Once inside her home, he repeatedly raped her and then brutally murdered her for the express purpose of preventing her from reporting the rapes. A jury convicted Schiro of murder while committing or attempting to commit rape. The judge sentenced Schiro to death, finding as an aggravating factor that Schiro intentionally killed Luebbehusen during the commission of a rape.

1. On February 4, 1981, Schiro was an inmate at the Second Chance Halfway House in Evansville, Indiana, where he was serving a three-year sentence for robbery that was partially suspended in connection with a work release program. R. 113, 889-91.¹ Schiro worked at a construction site across the street from Luebbehusen's house. R. 1067-69. While at work that morning, Schiro first contemplated the rape when he saw a woman, dressed in a pajama top and panties, step out of Luebbehusen's home to retrieve the mail. R. 116, 1741.² Throughout the day, Schiro thought about and planned the rape, becoming more excited when he saw her a second time later in the day. R. 44, 1741. After work, instead of attending an Alcoholics Anonymous meeting — a condition of being able to serve the remainder of his sentence in the halfway house — Schiro stole a bottle of liquor from a

¹Citations in the form "R. ____" refer to the original, sequentially paginated, eight volume trial court record in the case, with the number referring to the page of the citation. The original trial record is found in volumes 8-15 of what are denominated "State Court Records" in the Seventh Circuit's Record of Proceedings. Citations in the form "J.A. ____" are to the Joint Appendix, and citations in the form "App. ____" are to the Appendix bound with this brief.

²It is unclear from the record whether the woman Schiro saw was actually Luebbehusen or her roommate.

liquor store and went to an adult book store to watch "quarter movies," short film clips of hard core pornography. R. 115, 1435, 1437, 1743. Schiro was thrown out of the book store after he repeatedly exposed himself to the female attendant. R. 1743. He then proceeded directly to Luebbehusen's house. R. 1439, 1743.

Schiro knocked on Luebbehusen's door and she answered, dressed in a robe. R. 905, 1743. To gain entrance into her home, he asked to use her telephone to call his father, telling her, falsely, that his car had broken down across the street. R. 905-06, 1744. After he feigned use of the telephone, he asked to use the restroom. R. 1425.

In the restroom, Schiro masturbated to achieve erection. R. 1744. He then emerged from the restroom and exposed himself to Luebbehusen, who reacted with shock and fear. R. 1426, 1745. Schiro attempted to relax her by telling her, again falsely, that he was homosexual and that his homosexual friends had bet him that he could not have intercourse with a woman. He told her that he did not want to hurt her but merely wanted to win the bet. R. 1426, 1745.

Schiro forced Luebbehusen to consume drugs and alcohol that he had found in the house, and then raped her. R. 1745, 1427. To sedate her further, he forced her to consume more "downers" and alcohol while he consumed "speed." R. 1427, 1748. She attempted to escape when he left the room, but he caught her at the door, dragged her by the hair back into house, and raped her again. R. 1749. He then took her with him to purchase more alcohol. R. 1427, 1749. Upon their return to the house he raped her at least once, and probably two more times, then passed out on the couch. R. 1427-28, 1749-50.

Schiro awoke to find Luebbehusen dressed and running for the door. R. 1428. She had written a warning note to her roommate, presumably to place on the front door of the house, stating "Darlene, don't come in please. I've called the

police." R. 480, 489, 550. When she saw that Schiro had regained consciousness, Luebbehusen pleaded that she would not "tell on him if he never let her see his face again." R. 1430.

Instead, Schiro decided to kill her so she could not report his crimes. R. 1430. He dragged her back into the bedroom, shouting that she could not leave, and ordered her to lie on the bed face down. R. 1428, 1750. While she remained on the bed, he thought that she either had passed out or had fallen asleep. R. 1750. He located a one-gallon vodka bottle and a steam iron and placed them next to her on the bed. R. 1429, 1750.

As Luebbehusen still lay on the bed, Schiro hit her on the head with the vodka bottle until it shattered. R. 1750. She begged him not to kill her, but he repeatedly struck her head with the iron, splattering blood throughout the room, eventually covering the walls and floor. R. 1429, 1751, 442; *see also* R. 491. She continued to resist, so he strangled her to death. R. 1429, 1751. He then dragged her body into the living room, disrobed her, and performed various additional sex acts on the body. R. 1429, 1751.

Schiro made an effort to clean the house before leaving. R. 1432. He took with him the gloves he had worn during the attack to avoid leaving fingerprints and later gave them to his girlfriend, who washed them, cut them into small pieces, and disposed of them. R. 1432-33. He also destroyed the clothing he had worn during the murder. R. 910. He returned to the halfway house at approximately 5:30 a.m. on February 5 and convinced the night supervisor to falsify the sign-in sheet to indicate that he had arrived at 12:15 a.m. R. 904.

Two days later, Schiro confessed to his girlfriend that he had raped and killed Luebbehusen. R. 1425-33. Two days after that, he confessed the incident to the director of the

halfway house, who immediately contacted the police. R. 892, 904-06.

2. Schiro was charged with three counts of murder: knowing murder (Count I); felony murder — rape (Count II); and felony murder — criminal deviate conduct (Count III). J.A. 3-5.³ The state requested the death penalty only with respect to the felony murder counts. J.A. 6-7.

Evidence at trial showed Schiro to be a violent and dangerous man. His girlfriend testified that he would routinely beat, choke, bite and threaten her, in one instance knocking out several of her front teeth with his fist. R. 1447, 1463-67, 1472-73. Schiro also attempted to murder her and would often make life-threatening assaults on her son. R. 1464, 1461-62, 1181-82. Another woman testified that Schiro violently and repeatedly raped her while holding a gun to her one-year-old son's head and forcing her six-year-old daughter, who suffered from cerebral palsy, to watch. R. 1830-36. Schiro confessed to his expert, Frank Osanka, that he had committed some nineteen to twenty-four rapes prior to the time he raped and murdered Luebbehusen. R. 1721, 1728.

³Indiana recognizes a single crime of murder that is statutorily defined as follows:

A person who:

(1) knowingly or intentionally kills another human being; or

(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery;

commits murder, a felony.

Ind. Code § 35-42-1-1 (as it existed at the time of the crime, *see* Ind. Acts 1976, P.L. 148 § 2; Ind. Acts 1977, P.L. 340 § 25). The statute has since been amended to broaden the list of felonies. *See* Ind. Acts 1987, P.L. 326, § 2; Ind. Acts 1989, P.L. 296 § 1.

Schiro did not contest that he killed Luebbehusen; rather, his sole defense was that he was insane.⁴ Nor did Schiro or his counsel suggest to the jury that he either lacked or could not form the requisite *mens rea* to commit murder or rape. In closing argument, his counsel argued that the insanity defense had been made out or that, at the very least, Schiro should be found guilty but mentally ill, but never argued the absence of the requisite level of intent.⁵ See App. 15-26.⁶ Schiro did, however, contest both of the underlying felonies alleged in the felony murder counts. For example, in his closing argument to the jury at the guilt phase, Schiro's counsel suggested that Schiro's intercourse with Luebbehusen

⁴The court retained two psychiatrists to render expert opinions regarding Schiro's sanity. Dr. Charles Crudden concluded that, while Schiro was "a very dangerous man," he was not insane. R. 1183-84. Dr. Crudden did "not see how any psychiatric treatment would be of any benefit to him, and regardless of what treatment he received he would still remain a dangerous person." R. 1183. Dr. Barnard Woods also concluded that Schiro was not insane. R. 1287-88. The state's psychiatric expert, Dr. David G. Crane, also testified that Schiro was not insane. R. 1851.

Schiro presented expert testimony from Frank Osanka and Dr. Edward Donnerstein. Osanka, a "behavior consultant" who holds degrees in sociology and psychology but is not a psychiatrist, clinical psychologist or medical doctor, opined that Schiro was insane and diagnosed him as a "paranoid schizophrenic." R. 1692, 1752-54, 1760, 1767. Dr. Donnerstein likewise opined that Schiro was insane, but never personally interviewed Schiro, relying instead on "statements that he gave Doctor Osanka." R. 1639-40.

⁵Thus, petitioner's statement that "The principal dispute was whether Schiro 'knowingly' killed or whether, instead, the killing was the product of a sick mind plagued by a belief system ingrained with bizarre sexual ideation," Pet. Br. at 5-6, which is unaccompanied by any citation to the record, is simply untrue.

⁶The transcript of the final arguments at the guilt phase is contained in a separately paginated volume, denominated as Volume 4 of the "State Court Records" in the Seventh Circuit Record of Proceedings and is reproduced as Appendix A, App. 1-29.

was consensual. App. 25-26. Additionally, as noted in petitioner's brief, his counsel argued that the alleged acts of criminal deviate conduct all occurred after the death, and thus the murder did not occur "while" the defendant was committing or attempting to commit criminal deviate conduct. Pet. Br. at 37 & n. 32; App. 25.

In its preliminary instructions to the jury, the court explained that the state sought the death penalty only with respect to Counts II and III, the felony murder counts. J.A. 11. In its final instructions, the court told the jury:

To sustain the charge of murder, the State must prove the following proposition:

First:

That the defendant engaged in the conduct which caused the death of Laura Luebbehusen;

Second:

That when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen.

J.A. 22-23.⁷

The court did not instruct the jury that it had to return verdicts on all counts, and the defendant did not seek any such instruction. See J.A. 21-36. To the contrary, his counsel told the jury that "you'll have to go back there and try to figure out which *one* of the eight or ten verdicts . . . that you will return to this court." App. 17 (emphasis added). Similarly, the prosecutor told the jury that "you are only going to be allowed to return one verdict." *Id.* at 27, 28. The

⁷The trial court's final instructions also defined "murder" as either knowingly or intentionally killing OR killing in the course of one of the specified felonies, consistent with the Indiana statute set out in note 3, *supra*. J.A. 21.

prosecution asked the jury that its one verdict be that of murder while committing a rape:

You may find that we have obviously proven that there was a rape. You may also find that we have obviously proven at this trial that there was a murder and that the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict.

App. 28.

Although the court provided the jury with ten alternative verdict forms, the jury returned a verdict of guilty as charged on Count II and left the remaining forms blank. J.A. 37-38.⁸

At the sentencing phase, consistent with its indictment, the state requested the death penalty based on the aggravating factor that Schiro intentionally killed Luebbehusen during the commission of a rape. Both parties relied on the trial record and adduced no additional evidence. R. 262-64. At no time during the penalty phase did Schiro suggest that the jury had implicitly found that he lacked the intent to murder. To the contrary, Schiro's counsel acknowledged that he believed the jury had found that Schiro intentionally murdered Luebbehusen:

⁸The forms of possible verdict were: Not guilty by reason of insanity; Guilty of murder, but mentally ill; Guilty as charged on Count I; Guilty as charged on Count II; Guilty as charged on Count III; Not guilty; Guilty of the lesser included offense of voluntary manslaughter; Guilty of the lesser included offense of involuntary manslaughter; Guilty of voluntary manslaughter, but mentally ill; and Guilty of involuntary manslaughter, but mentally ill. J.A. 37-38. In the original record, the verdict forms set out above appeared on three sheets of paper, with the first three on a single sheet, the next three on separate sheet, and the last four on a third sheet. There is no indication of the order in which the sheets were arranged when given to the jury.

The statute again, I'm not going to read the whole thing to you, because the Judge will send it back with you, provides for aggravating circumstances. There is one listed in this case, and one which you may consider. And that one is that the murder was committed, was intentionally committed in the commission of rape and some other things. I assume by your verdict Friday, or Saturday, that you've probably decided that issue. In finding him guilty of murder in the commission of rape, I'm assuming you've decided beyond a reasonable doubt that it was done in the commission of a rape, and so that aggravating circumstance most likely exists in your mind.

App. 31-32.⁹ Accordingly, Schiro's counsel confined his argument to suggesting the presence of mitigating factors. App. 32-37.

The jury was instructed at the penalty phase that "[t]he Court is not bound by your recommendation." App. 40. The court also instructed the jury that it should not recommend the death penalty if it either found no aggravating circumstances or found any aggravating circumstances outweighed by mitigating ones, but that it "may" recommend the death penalty if it found that aggravating circumstances outweighed mitigating ones. *Id.* The jury returned a recommendation against the death penalty. J.A. 40.¹⁰

The trial court found the presence of the alleged aggravating factor — that Schiro intentionally killed

⁹The final arguments and instructions at the penalty phase appear at R. 264-83 and are reproduced as Appendix B, App. 30-41.

¹⁰Indiana law applicable at the time provided that murder was punishable by death or by imprisonment of 30-60 years. Assuming full good-time credit, a defendant sentenced to a term of years would be eligible for release after serving half of his sentence. App. 39.

Luebbehusen during the course of a rape. The court then carefully considered and rejected each of the mitigating factors urged by Schiro. J.A. 45-50; *see also* J.A. 42-44. Thus, the court rejected the jury's recommendation and imposed the death penalty.

3. The Indiana Supreme Court affirmed Schiro's conviction and sentence on direct appeal. J.A. 51. This Court denied Schiro's petition for a writ of certiorari. 464 U.S. 1003 (1983).

Schiro then filed a petition for postconviction relief, claiming that the trial court was biased and that his counsel was ineffective. The trial court (by special judge) denied the petition. The Indiana Supreme Court again affirmed, J.A. 101, and this Court again denied certiorari. 475 U.S. 1036 (1986).

Schiro then filed a second petition for postconviction relief, in which he argued, for the first time, that his sentence was barred by the Double Jeopardy Clause of the United States Constitution because the jury had "acquitted" him of the aggravating factor on which his sentence was based. J.A. 130. The trial court denied the petition, and the Indiana Supreme Court again affirmed, holding that, under Indiana law and on the basis of this record, the jury's silence on Count I did not constitute an acquittal of that count:

The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, *it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider.*

J.A. 140 (emphasis added). This Court again denied certiorari. 493 U.S. 910 (1989).

Schiro then sought a writ of habeas corpus under 28 U.S.C. § 2254 from the district court, raising, among several other grounds, his double jeopardy claim. The district court denied the writ. J.A. 146. The court of appeals unanimously affirmed. J.A. 183. In rejecting Schiro's double jeopardy claim, the court of appeals relied principally on the Indiana Supreme Court's determination that jury did not acquit Schiro of intentional murder. J.A. 195-98.

SUMMARY OF THE ARGUMENT

I. The petitioner's novel claim is that when a jury finds a defendant guilty of felony murder but is silent on a separate charge of intentional murder, the verdict must be deemed an "acquittal" of the latter for the purposes of sentencing the defendant. Nothing in this Court's precedents supports such an extension of the double jeopardy protection. Indeed, properly viewed, petitioner's claim is one of collateral estoppel, not double jeopardy.

A. Double jeopardy protects a defendant from retrial whether he is acquitted or convicted in the first proceeding. Taken to its logical conclusion, therefore, petitioner's double jeopardy argument would prevent *any* sentencing of a defendant after the "guilt phase" of a trial has ended. It is for this reason that this Court has resisted attempts to extend the principles of prior acquittal to sentencing.

B. The "implied acquittal" doctrine, on which petitioner relies so heavily, deduces that a finding of guilt on a *lesser* offense indicates acquittal of a *greater* charged offense. However, that doctrine has no application where, as here, the defendant is charged with two equal theories of committing the *same* offense. Under Indiana law, as at common law, intentional murder and felony murder are simply two different ways of committing the offense of murder; neither is lesser than or included in the other. Thus there is no rational basis for assuming that a conviction of one constitutes an acquittal of the other.

C. *Bullington v. Missouri*, 451 U.S. 430 (1981), is limited to its prohibition of a *second* capital sentencing hearing after a defendant has been “acquitted” of the death sentence in the first hearing. This Court has expressly refused to extend *Bullington* to prevent relitigation of discrete aggravating circumstances. Moreover, *Bullington*’s focus on the “embarrassment, expense, and ordeal” of a second trial does not apply to the original sentencing hearing. Thus the petitioner’s claim is more properly understood as a claim of collateral estoppel, *i.e.*, that the jury resolved the issue of “intent to kill” in his favor at the guilt phase in a way that precluded the trial judge from finding intent to kill in sentencing him.

In sum, this Court’s “implied acquittal” cases hold that the state has only one opportunity to prove guilt, and *Bullington* holds that the state has only one opportunity to prove that the death penalty is appropriate. None of this Court’s precedents, however, stands for the novel proposition that the state is not entitled to proceed at both the guilt and sentencing phases where the defendant has been *convicted*.

II. The petitioner’s burden to establish a collateral estoppel claim is heavy. He must show that the jury “actually determined” that the killing was committed without the requisite intent. Any uncertainty about whether the jury decided the issue of intent prevents the estoppel. On this record, Schiro cannot even approach the necessary showing.

III. Regardless of the characterization of Schiro’s claim, it fails because the record in this case clearly shows that the jury did *not* decide that Schiro lacked the intent to kill and did not “acquit” him of anything. Instead, the jury chose the verdict that most comprehensively described the offense he committed, a killing during the course of rape.

A. The record shows this in a variety of ways:

- The evidence showed that Schiro, by his own admission, decided to kill the victim after the rapes so that she could not report them.
- The instructions told the jury it could find either knowing murder OR felony murder, but did not instruct the jury to make findings on both.
- The prosecutor and defense counsel told the jury that it should return only one verdict in the case, and this was supported by the jury instructions and Indiana law.
- The prosecutor *asked* the jury to return a verdict of felony murder and the jury knew that the state had requested the death penalty only on the felony murder counts.
- Schiro’s attorney never asked the jury to find lack of intent — an issue analytically distinct from insanity.
- By finding Schiro guilty of felony murder, the jury not only rejected the insanity defense but also had to find that he intended to commit the underlying felony, rape. On this record, there is no rational basis for concluding that the jury found that Schiro could and did form the intent to rape but not to kill.

B. The lower federal courts correctly deferred to the Indiana Supreme Court’s finding that the jury “chose not to consider” the knowing murder count and therefore did not resolve the issue of intent to kill. Such deference is required in habeas corpus cases by 28 U.S.C. § 2254(d) and in other cases by the strictures of federalism. The issue of what a jury meant by its verdict is fact-sensitive, and the state courts are in a better position by virtue of their knowledge and experience to determine the meaning, if not the legal effect, of a particular verdict. The Indiana Supreme Court’s conclusion

was fairly supported by the record in this case and should therefore control.

IV. Finally, should this Court be inclined to extend double jeopardy or collateral estoppel principles to the situation presented by this case, it should not announce such a novel rule and apply it retroactively to this case. As argued above, the petitioner's double jeopardy theory would require this Court to hold that an original sentencing hearing is a second "trial" and that a conviction of one theory of proving an offense constitutes an implied acquittal of any equally valid theories of proving the same offense. Moreover, the notion that a sentencing judge is "collaterally estopped" by supposed findings underlying the verdict at the guilt phase is itself wholly novel. Such a holding would be a "new rule" not subject to announcement or retroactive application in a habeas corpus case.

The two narrow exceptions to the "new rule" doctrine do not apply here. The first exception does not apply because Schiro's new rule would not decriminalize private conduct (killing rape victims) nor would it immunize a category of defendants based on their status or offense. It is not an absolute bar to subjecting a defendant to the power of the court (as are some double jeopardy principles) because the rule that petitioner seeks would only preclude particular issues, not entire sentencing hearings.

The second exception does not apply because the new rule sought by Schiro would not be a "watershed rule of criminal procedure" that significantly enhances the accuracy of the determination that Schiro is eligible for the death penalty. There is nothing in the mechanistic rule Schiro seeks that would enhance the accuracy of a capital sentencing proceeding.

ARGUMENT

I. PETITIONER'S DOUBLE JEOPARDY CLAIM IS NOT CONSISTENT WITH ESTABLISHED PRINCIPLES OF DOUBLE JEOPARDY LAW; IF HE HAS A CLAIM AT ALL, IT IS ONE OF COLLATERAL ESTOPPEL RATHER THAN DOUBLE JEOPARDY.

At bottom, petitioner's claim is that the jury, in the guilt phase, made a finding on the intent issue that was binding on the trial judge at the penalty phase. This claim, properly viewed, is one of collateral estoppel rather than of double jeopardy *simpliciter*. Double jeopardy, in the classic sense, prevents retrial regardless of whether the first trial ended in conviction or acquittal, a result that obviously makes no sense when applied to the guilt and penalty phases of a bifurcated capital case. Nor does the "implied acquittal doctrine," which holds that conviction of a lesser included offense operates as an acquittal of a greater offense, have any application where the jury is simply told to return one verdict on two equivalent theories of the same offense — murder. Moreover, even recent developments in double jeopardy, such as *Bullington v. Missouri*, 451 U.S. 430 (1981), which holds that a *second* capital sentencing proceeding is barred when the first ended in a "death penalty acquittal," have no application to an *initial* capital sentencing proceeding.

A. Classic Double Jeopardy Principles Do Not Support the Result Petitioner Seeks.

Schiro's double jeopardy claim rests on two fundamentally erroneous propositions. First, he argues that the guilt and sentencing phases of a single capital case constitute entirely separate prosecutions for double jeopardy purposes — a proposition that finds no support in this Court's precedents. More extraordinarily, he further contends that his jeopardy ended at the conclusion of the guilt

phase. This novel framework is irreconcilable with this Court's double jeopardy jurisprudence and the historical underpinnings of the Clause.

As this Court has noted, the protections afforded by the Double Jeopardy Clause have their historical roots in the common law pleas of prior conviction and prior acquittal. *United States v. Wilson*, 420 U.S. 332, 339-42 (1975); see also *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980).¹¹ Thus, this Court has long held that once an allegation of an offense is finally resolved, the defendant is protected from further prosecution *regardless of whether he was convicted or acquitted in the first prosecution*. E.g., *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal [and] against a second prosecution for the same offense after conviction").¹² Accordingly, the guilt phase and the sentencing phase of a single capital proceeding cannot constitute separate prosecutions. Otherwise, the state could never advance to the sentencing phase because, as Schiro argues here, jeopardy would end at the conclusion of the guilt phase.

That petitioner's claim does not fall within the scope of traditional double jeopardy analysis is confirmed by this

¹¹As this Court noted in *DiFrancesco*, double jeopardy also had roots in the common law plea of former pardon. 449 U.S. at 128. Additionally, the Clause may have borne some relationship to the now obsolete plea of prior attain. See, J. Sigler, DOUBLE JEOPARDY at 18-20 (1969).

¹²The ancient plea of former conviction, as an aspect of the Double Jeopardy Clause, has found its primary expression in this Court's decisions holding that a subsequent prosecution may not be maintained for a greater offense after the defendant has already been convicted of a lesser included offense. E.g., *Brown v. Ohio*, 432 U.S. 161 (1977); see also *United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849 (1993).

Court's statement of the protections afforded by the Clause in *North Carolina v. Pearce*:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

395 U.S. at 717; see also *Wilson*, 420 U.S. at 342-43. Notably absent from the list of protections recognized by this Court is any mention of some constitutionally mandated relationship between the jury's verdict and the trial court's sentencing decision.

Indeed, this Court has *never* held that an original sentencing hearing is a separate prosecution for double jeopardy purposes, and has consistently declined to accept any such notion. In *DiFrancesco*, for example, this Court refused to consider the initial pronouncement of sentence an "acquittal" of imposition of a greater sentence after remand. In *Moore v. Missouri*, 159 U.S. 673 (1895), this Court refused to hold that a sentencing hearing under a recidivist-enhancement statute was a second trial or multiple punishment for the prior offenses.

In its jurisprudence under the Double Jeopardy Clause, this Court has applied the so-called "*Blockburger* test" to hold that a subsequent prosecution is not barred if each crime contains an element that the other does not. See *Dixon*, 113 S. Ct. at 2856 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).¹³ However, petitioner concedes that, under the *Blockburger* test, felony murder and intentional

¹³In *Dixon*, this Court overruled *Grady v. Corbin*, 495 U.S. 508 (1990), which had, in addition to requiring that the crimes contain mutually exclusive elements, required that they pertain to different conduct by the defendant in order to be separate offenses for double jeopardy purposes. See 113 S. Ct. at 2860.

murder are not the "same offense." Pet. Br. at 25-26 & n. 23. It follows then, under petitioner's view of the case, that he could have been tried separately for the two "crimes" without violation of the Double Jeopardy Clause, regardless of which was tried first, and regardless of whether he was convicted or acquitted at the first trial. *Dixon* (prior conviction); *Burton v. United States*, 202 U.S. 344 (1906) (prior acquittal). This again confirms that petitioner's claim is not one of simple "double jeopardy."

If, however, he were *acquitted* of one of the offenses, *and* that acquittal can be shown to have resulted from an actual and unambiguous determination of some fact that would conclusively bar conviction for the second offense, then *collateral estoppel* would preclude the second prosecution. See *Ashe v. Swenson*, 397 U.S. 436 (1970). Schiro's claim is a variant of this latter variety, which he seeks to apply to a supposed finding on a single element of one aggravating factor. He does not claim that the state would have been precluded from proceeding to the sentencing phase had the jury returned verdicts of conviction on all three counts. Nor could he logically do so. For if the state is entitled to "one fair opportunity" to try and convict a defendant, *Bullington*, 451 U.S. at 446 (citation omitted), that opportunity surely extends to seeing that he is not only convicted but also sentenced. Rather, petitioner's claim is that the jury found some fact (lack of the intent to kill) and that finding was binding on the trial court at sentencing. Properly viewed, this is a claim of collateral estoppel, not double jeopardy.¹⁴

¹⁴ Assuming that there is any merit to the notion of a constitutionally mandated "collateral estoppel" relationship between the jury's fact finding at the guilt phase and the sentencer's fact finding at the sentencing phase, it is far from clear that such a requirement would be properly grounded in the Double Jeopardy Clause. For example, *Dairy Queen v. Wood*, 369 U.S. 469 (1962), and *Beacon Theaters v.*

B. The "Implied Acquittal" Doctrine Does Not Apply Where the Jury's Verdict is Merely One of Two Alternative Means of Proving the Same Offense.

Schiro's reliance on the "implied acquittal" doctrine of *Price v. Georgia*, 398 U.S. 323 (1970), and *Green v. United States*, 355 U.S. 184 (1957), is similarly unavailing. Neither case even remotely suggested that a sentencing phase is a separate prosecution for double jeopardy purposes. More importantly, each differs from this case in two key respects. First, *Price* and *Green* involved a reprosecution of an accused for a greater offense after he had been convicted of a lesser-included offense. See *Price*, 398 U.S. at 327; *Green*, 355 U.S. at 189-90. Second, in *Price* and *Green*, each defendant

Westover, 359 U.S. 500 (1959), both suggest that the Seventh Amendment requires a federal judge to give preclusive effect to a jury's findings on a "mixed" law and equity claim that must first be tried to a jury under the Seventh Amendment. And in *Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16 (1979), and *Ingraham v. Wright*, 430 U.S. 651, 664-71 (1977), this Court analyzed preconviction deprivations alleged to be cruel and unusual punishment under the Due Process Clause because "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Ingraham*, 430 U.S. at 671-72 n. 40. Prior to that time "The pertinent constitutional question is whether the imposition is consonant with the requirements of due process." *Id.* at 671. Similarly, assuming that there is *any* constitutionally required relationship between the guilt phase verdict, and facts found at sentencing, it would more properly be found in the Due Process Clause, or the Sixth Amendment's right to a jury trial, rather than the Double Jeopardy Clause. Schiro, however, has raised no such claims in this Court, and it would be inappropriate for this Court to comment on the contours of claims not presented in the petition. See, e.g., *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 & n. 23 (1989) (Court declined to decide whether punitive damages award violated due process where only claim made in petition was that award violated Eighth Amendment's Excessive Fines Clause).

was subjected to a complete reprosecution for the greater offense following the reversal on appeal of the conviction for the lesser-included offense. 398 U.S. at 324-25; 355 U.S. at 186. Those two core facts — both of which are missing here — formed the basis for this Court's analysis. Thus, in those cases this Court held that the Double Jeopardy Clause barred reprosecution for the greater offense but allowed reprosecution for the lesser-included offense for which the accused had been originally convicted. The Court reasoned that the jury's silence with respect to the greater offense in the first trial was an "implicit acquittal" of that charge and that "the first jury 'was given a full opportunity to return a verdict' on that charge and instead reached a verdict on the lesser charge." *Price*, 398 U.S. at 329 (quoting *Green*, 355 U.S. at 191).

The holdings of *Price* and *Green* cannot be extended to include the very different situation in this case. When a jury elects to convict a defendant of a lesser-included offense and is silent on the greater one, there exists a degree of certainty that the jury was unable to find that the defendant committed the greater crime or that the jury nonetheless intended to exercise its prerogative to acquit against the evidence. That is simply not true of felony murder and knowing murder, which under Indiana law, as under the common law, are two ways of proving the same offense, *i.e.*, murder. See *Schad v. Arizona*, 501 U.S. ___, 111 S. Ct. 2491, 2501 (1991) (plurality opinion); *id.* at 2505-06 (Scalia, J., concurring); *Head v. State*, 443 N.E.2d 44, 48 (Ind. 1982).¹⁵

¹⁵Within two years of Indiana's statehood, its legislature passed what appears to be the state's first murder statute, which provided:

If any person or persons of sound memory and discretion, unlawfully killeth any reasonable creature, in being and under the peace of this state, with malice aforethought either express or implied, the person or persons so offending, shall be adjudged guilty of murder,

Indeed, felony murderers are often more culpable than intentional murderers. As this Court has noted, "some nonintentional murderers may be among the most dangerous and inhumane of all." *Tison v. Arizona*, 481 U.S. 137, 157 (1987). This understanding of felony murder is clearly applicable here. The state sought the death penalty only with respect to the felony murder counts but not with respect to the knowing murder count — a fact of which the jury was fully aware. J.A. 7, 11. Moreover, the trial court instructed the jury that to convict of any species of murder, including felony murder, it had to find that Schiro killed Luebbehusen

and upon confession or conviction thereof by a jury of the county, shall have judgment of death.

2 Laws of Ind., ch. V, § 2 (1818) (emphasis in original). At that time, the Indiana courts considered the state to have adopted the common law of England and the above statute to be "merely declaratory of the common law." *Fuller v. State*, 1 Blackf. 63, 65-66 (1820).

When its code was revised in 1843, Indiana replaced the terms "malice aforethought either express or implied" with their more descriptive modern equivalents:

If any person of sound memory and discretion shall purposely and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any reasonable creature in being and under the peace of this state, such person shall be deemed guilty of murder in the first degree, and upon due conviction thereof shall suffer death.

Ind. Rev. Stat., ch. 53, § 2 (1843). Compare *Schad*, 111 S. Ct. at 2501 (at common law, intent to commit a felony was considered an aspect of the concept of "malice aforethought") (citing 3 J. Stephen, *HISTORY OF THE COMMON LAW OF ENGLAND* 21-22 (1883)). Felony murder has remained an equal, independent means by which to commit murder to this day. *E.g.*, 2 Ind. Rev. Stat., pt. III, ch. VI, § II (1852); Ind. Rev. Stat., § 1904 (1881); 1905 Ind. Acts, ch. 169, § 347; 1941 Ind. Acts, ch. 148, § 1; 1976 Ind. Acts, P.L. 148, § 2.

intentionally J A 22-23. Thus, the jury chose to convict Schiro of the crime that was the most serious and carried the highest possible penalty. Unlike *Price* and *Green*, the jury's silence with respect to Count I cannot logically be presumed to represent an acquittal.

The language that Schiro seeks to borrow from *Price* and *Green* — that the jury had “a full opportunity to convict” — is similarly unavailing. Indeed, this Court suggested in *Price* that a situation like the present one, where the jury was required to render only one verdict from two equal and alternative theories of murder, does not provide the jury with a “full opportunity” to return a verdict on both theories. 398 U.S. at 329 & n. 5 (citing *People v. Jackson*, 20 N.Y.2d 440, 285 N.Y.S.2d 8, 231 N.E.2d 722 (1967), *cert. denied*, 391 U.S. 928 (1968)).

The Court's reliance on *Jackson* is highly significant because of the close similarity between *Jackson* and this case. In *Jackson*, the defendant had been charged with both felony murder and premeditated murder (both of which constituted first degree murder under New York law). At the conclusion of his first trial, the jury returned a verdict of guilty of premeditated murder but was silent on the felony murder theory. His conviction was ultimately overturned by this Court on grounds pertaining to the voluntariness of a confession that was admitted at his first trial. *See Jackson v. Denno*, 378 U.S. 368 (1964). On retrial, the prosecution again attempted to prove both premeditated murder and felony murder, and the defendant objected, claiming that the implied acquittal principle of *Green* barred his retrial on the felony murder theory. Rejecting his claim, the New York Court of Appeals held that double jeopardy did not bar the retrial:

Since the jury was instructed to render only one verdict, it had no reason to consider the felony murder charge once it found the defendant guilty of

premeditated murder. We are, of course, aware of the fact that the Judge instructed the jury that the order of consideration of the respective theories was entirely up to them. Thus, it is possible that the jury considered felony murder first and acquitted him of that theory but under the single verdict charge the jury was not able to express an acquittal, and to say that the defendant was so acquitted would be to engage in mere speculation.

231 N.E.2d at 730-31.¹⁶ Similarly here, the jury was told to render only one verdict, App. 17, 27, 28, and to conclude that the jury acquitted Schiro of knowing murder would be sheer speculation, if not total fiction. *See also Cichos v. Indiana*, 385 U.S. 76, 79-80 (1966) (rejecting contention that petitioner was impliedly acquitted where jury was instructed to return only one verdict on multiple theories of the same offense).

C. The Capital Sentencing Hearing In This Case Was Not A “Successive Prosecution” Under *Bullington v. Missouri*.

Bullington v. Missouri dealt with a *second* capital sentencing proceeding in which the state sought to achieve a result at odds with the first. While *Bullington* held, by a five-to-four majority, that a state may not subject a defendant to a *second* capital sentencing hearing when the first has ended in a death penalty “acquittal,” that holding cannot be expanded to reach a conclusion that the *first* capital sentencing hearing constitutes a second “jeopardy” simply because it follows the trial on guilt or innocence. Neither *Bullington*, nor this Court's subsequent cases construing it, suggest that it applies in such a novel way.

¹⁶The same result was reached on federal habeas review. *United States ex rel. Jackson v. Follette*, 462 F.2d 1041 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972).

Poland v. Arizona, 476 U.S. 147 (1986), for example, held that a second capital sentencing hearing is not barred where the only aggravating circumstance relied upon by the sentencing judge was found unsupported by the evidence on appeal, but the appellate court also corrected the sentencing judge's legally erroneous ruling on the scope of another aggravating circumstance, permitting consideration of that circumstance (and imposition of the death penalty) on remand. The Court noted that the proper *Bullington* inquiry was whether the sentencer had "acquitted" the defendant of the death penalty *in toto* and that *Bullington's* focus on the fact that the sentencer had only two alternatives was "inconsistent with the view that for double jeopardy purposes the capital sentencer should be seen as rendering a series of mini-verdicts on each aggravating circumstance." 476 U.S. at 153 n. 3. Thus, this Court held:

We reject the fundamental premise of petitioner's argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate*. We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point.

476 U.S. at 155-56 (emphasis in original, footnote omitted).

Petitioner's claim here is similar. He has not contended that the jury "acquitted" him of the death penalty. Under Indiana law, the jury had no such power. See Ind. Code § 35-

50-2-9(e); cf. *Spaziano v. Florida*, 468 U.S. 447, 465 (1984) (holding constitutionality of allocating capital sentencing decisions to a judge, rather than a jury, "disposes of petitioner's double jeopardy challenge" because jury's sentencing recommendation "does not become a judgment simply because it comes from a jury."). Rather, petitioner claims that the jury acquitted him of the "intent" element in the aggravating circumstance of an intentional killing during the course of a felony. Under *Poland*, this is simply insufficient to constitute a *Bullington* "death penalty acquittal."

Bullington, to the extent that it survives,¹⁷ should not be extended to hold that an *original* capital sentencing hearing is a "subsequent prosecution" for double jeopardy purposes. Such an extension would serve none of the purposes of the Double Jeopardy Clause as enunciated by this Court, and would "push the analogy on which *Bullington* is based past the breaking point." *Poland*, 476 U.S. at 156.¹⁸

¹⁷The grant of certiorari in *Caspari v. Bohlen*, No. 92-1500, cert. granted, 113 S. Ct. 2958 (1993), encompasses the question of whether *Bullington* should be overruled. See 61 U.S.L.W. 3778. The overruling of *Bullington* would, of course, render unnecessary a determination of its application to this case.

¹⁸Moreover, this Court's prior acquittal precedents uniformly forbid *reprosecution* or *retrial* of a defendant who has been acquitted of the crime charged. See, e.g., *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873) (common law forbade a "second trial" for same offense); *United States v. Ball*, 163 U.S. 662, 671 (1895) (acquittal bars "subsequent prosecution" for same offense); *Green v. United States*, 355 U.S. 184, 188 (1957) (quoting *Ball*, holding that prior acquittal barred *retrial* after remand); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568-70 (1977) (controlling constitutional principle focuses on prohibition of "multiple trials;" Double Jeopardy Clause not offended where there is no threat of "successive prosecutions."); *United States v. Wilson*, 420 U.S. 332, 344 (1975) (same; government appeal does not implicate double jeopardy "where appellate review would not subject the defendant to a second trial"). Thus this Court has *never* held that an

In sum, while *Green* and *Price* hold that the state can be afforded only one opportunity to prove guilt, and *Bullington* holds that the state can be afforded only one opportunity to prove that the death penalty is appropriate none of those cases stands for the novel proposition that the state is not entitled to proceed at both the guilt and sentencing phases where the defendant has been convicted. Petitioner's unwarranted expansion of those cases should be rejected.

II. COLLATERAL ESTOPPEL PRECLUDES RELITIGATION OF AN ISSUE ONLY WHERE THE ISSUE WAS ACTUALLY DETERMINED IN A PRIOR PROCEEDING.

Because his claim has no basis in pure double jeopardy law, Schiro must fall back on principles of collateral estoppel to prevail on his claim that the trial court was precluded from finding intent to kill. The burden is a difficult one for a petitioner to meet.

The doctrine of collateral estoppel applies in limited circumstances. Under that doctrine, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). See also *id.* at 442 (collateral estoppel bars "relitigation between the same parties of issues actually determined at a previous trial"). The standard for whether an issue of ultimate fact has been "actually determined" is exacting. Collateral estoppel does not bar relitigation if the jury "could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (citation omitted). See also

original sentencing hearing is a separate "trial" or "prosecution" for double jeopardy purposes, and has consistently avoided such a holding. See cases cited *supra* at 17.

Dowling v. United States, 493 U.S. 342, 352 (1990) (collateral estoppel is not applicable where "[t]here are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial."); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) ("the jury verdict in the criminal action did not *negate the possibility* that a preponderance of the evidence could show that Mulcahey was engaged in an unlicensed firearms business.") (emphasis added).

For collateral estoppel to bar reprosecution, there can be no ambiguity whatsoever about which facts were actually decided by the prior verdict. For example, in concluding that the jury decided that a defendant did not participate in robbery, this Court in *Ashe* explained that the jury's verdict "can lead to but one conclusion." 397 U.S. at 445. Similarly, in *Turner v. Arkansas*, 407 U.S. 366 (1972), this Court held that "the *only logical conclusion* is that the jury found that he was not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates." *Id.* at 369 (emphasis added). Finally, in *Harris v. Washington*, 404 U.S. 55 (1971), no uncertainty existed because the "State concede[d] that the ultimate issue of identity was decided by the jury in the first trial." *Id.* at 56. See also *Simpson v. Florida*, 403 U.S. 384, 386-87 (1971).

The Court has steadfastly refused to expand the doctrine of collateral estoppel to instances where it is unclear what issues the prior verdict decided. Thus, collateral estoppel does not bar evidence of criminal conduct for which that defendant had been acquitted. *Dowling*, 493 U.S. at 352. Collateral estoppel does not bar a defendant's prosecution for aiding and abetting when the principal has been acquitted. *Standefer v. United States*, 447 U.S. 10, 21-25 (1980). Nor does the doctrine bar forfeiture proceedings arising out of conduct for which the defendant has been acquitted. *One Assortment of 89 Firearms*, 465 U.S. at 361-62, *One Lot Emerald Cut*

Stones and One Ring v. United States, 409 U.S. 232, 234-35 (1972).

The burden for demonstrating that the issue whose relitigation he seeks to foreclose was actually decided in the prior trial rests squarely with the defendant. *Dowling*, 493 U.S. at 350. That burden is a significant one, *see id.* at 351-52, as "collateral estoppel should be applied sparingly against the Government." *Id.* at 360 n.3 (Brennan, J., dissenting) (citing *Standefer*, 447 U.S. at 22-24). As shown below, Schiro does not even come close to meeting these exacting standards.

III. THE RECORD DOES NOT SHOW THE JURY "ACQUITTED" SCHIRO OF INTENTIONAL KILLING OR RESOLVED THE INTENT ISSUE IN HIS FAVOR.

Regardless of whether Schiro's claim is characterized as a double jeopardy claim in which he must show an express or implied "acquittal," or as a collateral estoppel claim in which he must show the jury "actually determined" the issue of intent in his favor, the fundamental factual premise of the claim is that the jury exonerated him of the element of an intentional killing when it returned a guilty verdict on felony murder but was silent on "knowing" murder. Each of the four courts to consider the issue has rejected this underlying factual premise. This Court too should reject the premise, because the record simply does not support it. The jury did not acquit petitioner of anything and did not resolve the intent issue in his favor. That conclusion is further reinforced when the appropriate deference is accorded to the findings of the Indiana courts on this issue.

A. Review of the Evidence, Instructions, Arguments and Verdict Demonstrates That the Jury's Silence on the "Knowing" Murder Count Did Not Amount to an "Acquittal" or Other Determination on the Issue of Intent.

Review of the entire record in this case demonstrates that no "acquittal," implicit or otherwise, occurred. As this Court has held, an "acquittal" is a "ruling . . . [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Here, by contrast, there was, as the Indiana Supreme Court found, *no* resolution of the "knowing murder" count. Rather, what the jury obviously did, consistent with the instructions, verdict forms, argument, and evidence in the case, was return the one verdict that *most* completely described the facts of the case — that petitioner committed a murder during the course of a rape.

Under the evidence outlined in the statement of facts, *supra*, there can be no doubt that this was the most complete single verdict of all of the verdict forms submitted to the jury. By his own admission, petitioner raped the victim and then decided to kill her to avoid getting caught. A simple verdict of "murder" would not have fully expressed the heinousness of this crime.¹⁹

¹⁹Even though the murder occurred after the offense of rape had been completed, it is clear under Indiana law that it was committed "while" the defendant was committing or attempting to commit the rape. *See Davis v. State*, 477 N.E.2d 889, 894 (Ind.), *cert. denied*, 474 U.S. 1014 (1985) ("When there is a close proximity in terms of time and distance between the underlying felony and the homicide and there is no break in the chain of events from the inception of the felony to the time of the homicide, we treat the two events as part of one continuous transaction."). Schiro has never contended otherwise.

Nor can there be any doubt that the jury viewed its task as returning a single verdict, rather than any and all possibly appropriate verdicts. The trial court never instructed the jury that it was required to return verdicts on all counts. Rather, it instructed the jury, at petitioner's request, that "the defendant is not on trial for any *offense* other than *that* charged in the information," and referred, again in the singular, to "the *crime* charged." J.A. 31 (emphasis added). Similarly, defense counsel told the jury that "you'll have to go back there and try to figure out which *one* of the eight or ten verdicts. . . that you will return to this court." App. 17 (emphasis added). The prosecution likewise repeatedly told the jury that "you are only going to be allowed to return one verdict." *Id.* at 27; *see also id.* at 28. Indeed, the prosecutor explicitly argued to the jury that its one verdict should be of a murder during the course of a rape:

You may find that we have obviously proven that there was a rape. You may find that we have obviously proven at this trial that there was a murder and the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict.

Id. at 28.

The prosecution and defense arguments were entirely consistent with longstanding Indiana trial practice of instructing the jury to return only one verdict where multiple theories of the same offense are charged, as recognized by this Court in *Cichos v. Indiana*, 385 U.S. 76, 79-80 (1966). Moreover, the Indiana Supreme Court has repeatedly held that, while the alternative theories of murder and felony murder may be tried together, a defendant may not be convicted of both for the killing of a single victim. *E.g.*, *Sandlin v. State*, 461 N.E.2d 1116, 1119 (Ind. 1984); *Bean v. State*, 267 Ind. 528, 371 N.E.2d 713, 716 (1978). Indeed,

where two convictions are erroneously entered, the Indiana Supreme Court has, on occasion, ordered the *nonfelony* murder conviction vacated. *Rondon v. State*, 534 N.E.2d 719, 729-30 (Ind.), *cert. denied*, 439 U.S. 969 (1989). Thus, both because the jury was told it should only return one verdict and because, under Indiana law, petitioner could only be properly convicted on one count, the jury's conviction on the single most comprehensive and descriptive count cannot realistically be viewed as an "acquittal" of any of the others. Rather, as the Indiana Supreme Court found, the jury simply "chose not to consider" the knowing murder count once it reached a verdict of guilty of felony murder. J.A. 140.

The jury instructions given by the trial court also fail to support petitioner's "implied acquittal" theory. Consistent with the murder statute, the trial court instructed the jury that murder consists of knowingly killing OR killing in the course of a specified felony. J.A. 21, quoting Ind. Code § 35-42-1-1. Unlike a case in which the jury must decide between greater and lesser included offenses, here the jury was simply given two equal alternatives. As in *Jackson*, there is no basis for concluding that these alternatives were considered in any particular order or that acceptance of one constituted rejection of the other.²⁰

Moreover, petitioner ignores the fact that the jury was instructed clearly, if erroneously, that:

To sustain the charge of murder, the State must prove the following proposition:

²⁰As noted in section I.B. *supra*, the "implied acquittal" doctrine of *Green v. United States* and *Price v. Georgia* has no application where, as here, the different counts are merely multiple and equivalent theories of murder. Moreover, even if the doctrine could be applied to such a circumstance in a true double jeopardy claim, it would still not satisfy the requirement of *collateral estoppel* that the issue sought to be foreclosed was "actually determined."

First

That the defendant engaged in the conduct that caused the death of Laura Luebbehusen;

Second

That when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen.

J.A. 22. Petitioner's contention that this instruction applied only to "*mens rea* murder" is simply unsupported by a review of the jury instructions as a whole. The trial court instructed the jury that "murder" was defined as *either* an intentional or knowing killing *or* a killing during the course of one of the specified felonies, J.A. 21, and the instruction quoted above was the *only* instruction setting out the state's burden of proof for murder.²¹

Petitioner's theory becomes even less tenable when one considers the argument presented by his counsel to the jury, both at the guilt and penalty phases. Petitioner's theory, simply put, is that the jury acquitted him of the "knowing murder" count because it found that he lacked the requisite intent element. However, petitioner *never presented this theory to the jury*. In closing argument, his counsel argued that the insanity defense had been made out, or that, at the very least, the defendant should be found guilty but mentally ill, *see* App. 15-26, but never argued the absence of the intent element of murder.

²¹Of course, the instruction was overly favorable to petitioner because, under Indiana law, an intent to kill is not required to sustain a conviction for felony murder. *Head*, 443 N.E.2d at 50 (collecting cases). However, the issue presented by this case is whether the jury *in fact* acquitted petitioner under the instructions given in this case, not how its verdict should be interpreted had other instructions been given.

Proof of the affirmative defense of insanity is analytically distinct from proof of the intent element of a crime, though in certain circumstances the two may be related. The "existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring); *see Leland v. Oregon*, 343 U.S. 790 (1952) (state statute requiring defendant to prove insanity by preponderance of the evidence did not unconstitutionally shift the burden of proof on an element of the offense). The jury, of course, rejected both petitioner's insanity defense and any conclusion that he was guilty but mentally ill. It strains credulity to suggest, as petitioner does, that the jury nonetheless gave sufficient weight to petitioner's evidence on those theories to decide the case on a "lack of intent" ground that petitioner never even argued.²²

Nor is it accurate for petitioner to contend that the intent element was the only disputed fact in the trial. In closing argument, defense counsel pointed out to the jury that the evidence suggested that the acts of criminal deviate conduct followed the victim's death, a point conceded by the prosecution on rebuttal. App. 25, 28. The defendant also suggested that no rape had occurred because the victim had consented to intercourse. App. 25. The jury's verdict that Schiro was guilty of murder during the course of a rape may be viewed more as an outraged rejection of his "consent" theory than as any implicit judgment with respect to intent.

²²Of course, in order to convict petitioner of felony murder, the jury was required to find that he could and did form the intent to rape. *See Head, supra*, J.A. 29. There is, on this record, no rational basis to distinguish between the intent to kill and the intent to rape. Indeed, petitioner's insanity evidence largely consisted of opinions that he was unable to control his sexual urges, not that he had an uncontrollable urge to kill.

Moreover, the argument made by petitioner's counsel at the penalty phase confirms that he believed the jury had found an *intentional* killing during the course of a rape:

The statute again, I'm not going to read the whole thing to you, because the Judge will send it back with you, provides for aggravating circumstances. There is one listed in this case, and one which you may consider. And that one is that the murder was committed, was intentionally committed in the commission of rape and some other things. I assume by your verdict Friday, or Saturday, that you've probably reached that point; you've probably decided that issue. In finding him guilty of murder in the commission of rape, I'm assuming you've decided beyond a reasonable doubt that it was done in the commission of a rape, and *so that aggravating circumstance most likely exists in your mind.*

App. 31-32 (emphasis added). Thus, petitioner's counsel confined his argument to the presence of various mitigating factors. *Id.* at 32-37.

Under the facts in this record, it is clear that the jury's verdict at the guilt phase did not signify any finding that petitioner lacked the intent necessary to commit "knowing murder," as this theory was never even presented to the jury. It is equally clear that the jury's recommendation at the penalty phase did not reflect any judgment as to the absence of the "intent" element necessary for the aggravating factor, because, again, that theory was never presented to it. Thus, the jury's recommendation at the penalty phase did not "illuminate" anything, except perhaps that it took a different view of the mitigating circumstances than did the sentencing judge or was simply inclined to recommend mercy. However, this plainly presents no constitutional problem. *Spaziano v. Florida*, 468 U.S. 447 (1984).

The factual predicate for petitioner's double jeopardy and collateral estoppel claims, *i.e.*, that the jury found in his favor during the guilt phase, is simply absent. Accordingly, those claims fail.²³

B. Deference Should Be Accorded to the Indiana Supreme Court's Findings Because They Are Fairly Supported by the Record.

Both the district court and the court of appeals were correct in relying on the Indiana Supreme Court's interpretation of the jury's verdict in this case. Respondents do not suggest, as petitioner contends, that a state court is absolutely free to define what constitutes an "acquittal" for purposes of double jeopardy law. Indeed, as noted above, this Court has expressly defined an "acquittal" as a "ruling . . . [that] actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen Supply Co.*, 430 U.S. at 571. However, the determination of whether a particular ruling "actually represents a resolution" of the elements of the offense is fundamentally a factual one, to be made in the first instance by the state courts.

In the habeas context, deference to the state courts' factual findings is compelled by 28 U.S.C. §2254(d), which requires that state courts' findings of fact be "presumed correct." Findings of fact by state appellate courts are equally entitled to the presumption of correctness. *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981); *see Moran v. Burbine*, 475 U.S. 412, 417 (1986).²⁴ Federal courts reviewing a factual

²³To the extent this Court believed the facts were otherwise at the time it granted certiorari, it can, of course, dismiss the writ as improvidently granted. *Cf. Cichos, supra.*

²⁴The presumption is not defeated and indeed may be stronger where federal review is based on the identical record reviewed by the state appellate court. *Sumner v. Mata*, 449 U.S. at 547; *cf. Anderson v.*

determination of what a state court jury meant must heed the state courts' factual findings on this issue.

Indeed, this Court has previously held that to do anything else would plainly overstep the appropriate bounds of federal review of state criminal convictions. *Hoag v. New Jersey*, 356 U.S. 464, 471-72 (1958). In *Hoag*, which was decided even before the enactment of § 2254(d), this Court was asked to determine that a jury's verdict acquitting a defendant of the robbery of one victim acted as a collateral estoppel bar to his trial for robbery of other victims of the same criminal incident. The Court held that the state appellate court's interpretation of a verdict in a state jury trial was conclusive, and that it would be out of keeping with principles of federalism to "overrule state courts on controverted or fairly debatable factual issues." 356 U.S. at 471. As this Court held, "For us to try to outguess the state court on this score would be wholly out of keeping with the proper discharge of our difficult and delicate responsibilities under the Fourteenth Amendment in determining whether a State has violated the Federal Constitution." *Id.* at 472.²⁵

Similarly in *Cichos v. Indiana*, 385 U.S. 76 (1966), this Court relied on the Indiana Supreme Court's interpretation of a state jury verdict. Cichos was charged with one count each of reckless homicide and involuntary manslaughter. At his first trial he was found guilty of reckless homicide, which carried a lesser penalty, but he appealed and was granted a

Besemer City, 470 U.S. 564, 574 (1985) ("clearly erroneous" standard of Fed. R. Civ. P. 52(a) applies even when district court's findings rest on physical or documentary evidence).

²⁵Thus, this Court declined to reach the issue of whether collateral estoppel was constitutionally required, an issue it later reached and answered in the affirmative in *Ashe v. Swenson*, 397 U.S. 436 (1970), because, under the state court's interpretation of the verdict, no estoppel would have arisen in any event.

new trial. At the second trial, Cichos was retried on both counts and again found guilty of reckless homicide. The conviction was affirmed and Cichos, apparently assuming that his retrial on the manslaughter count violated *Green v. United States*, 355 U.S. 184 (1957), sought and was granted a writ of certiorari on the question of whether the Double Jeopardy Clause applied to the states.²⁶

The Court dismissed the writ as improvidently granted because it accepted the Indiana Supreme Court's determination that Cichos had not been acquitted of the manslaughter charge at the first trial, placing particular reliance on the fact that "the Indiana Supreme Court knew of 'the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty. . . .'" 385 U.S. at 79-80. Thus, this Court held, "we cannot accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter and that the second trial therefore placed him twice in jeopardy." *Id.* at 80.

As *Hoag* and *Cichos* demonstrate, interpretation of a state jury's verdict is a question of fact that should be left to primary determination by the state courts. The question is essentially a matter of the jury's state of mind, based on an assessment of the verdict form, instructions, evidence and arguments.²⁷

²⁶At that time, the prevailing law on the applicability of the Double Jeopardy Clause to the states was *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled in pertinent part by *Benton v. Maryland*, 395 U.S. 784 (1969).

²⁷This Court has held that other inquiries into the state of mind of a juror are questions of fact. *Wainwright v. Witt*, 469 U.S. 412, 428-29 (1985) (excludability of juror for cause based on views on capital punishment); *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984) (juror bias from pretrial publicity); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (impact of *ex parte* communication on juror impartiality). Similarly,

Deference to the Indiana Supreme Court's interpretation of the verdict is also required because state courts are in a far better position to assess the meaning of a state jury's verdict. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985) (where issue falls between pure legal or pure factual question, fact/law determination sometimes turns on whether "one judicial actor is better positioned than another to decide the issue in question."). In the present case, much as in *Hoag* and *Cichos*, the Indiana Supreme Court, on consideration of the whole record, found that the jury's verdict that Schiro was guilty of murder during the course of a rape did not indicate that the jury had acquitted Schiro of "knowing" murder. Rather, as the Indiana Supreme Court found, "the jury chose not to consider" the felony murder count. J.A. 140.²⁸ Thus, far from being a "resolution" of the elements of intentional murder, the verdict in this case plainly left that matter open.

Both the district court and the court of appeals gave appropriate weight to this finding. J.A. 171; J.A. 196. Here, as in *Hoag*, this Court would overstep its constitutional bounds if it were "to try to outguess the state court on this score."²⁹ As in *Cichos*, the question purportedly presented by

lower federal courts presented with a situation in which the jury's verdict is ambiguous have treated resolution as a question of fact. *Freid v. McGrath*, 135 F.2d 833, 834 (D.C. Cir. 1943) (latent error in verdict may be corrected, after taking affidavits of jurors, by district court "if convinced of that fact"); *see United States v. Dotson*, 817 F.2d 1127, 1129-30, *vacated on rehearing on other grounds*, 821 F.2d 1034 (5th Cir. 1987) (district judge telephoned jurors for clarification of verdict); *E.F. Hutton & Co. v. Arnebergh*, 775 F.2d 1061 (9th Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986) (jury reconvened to explain civil verdict).

²⁸As discussed in the previous subsection, this finding is not only "fairly supported by the record" as required by 28 U.S.C. § 2254(d)(8), but is correct under any standard of review.

²⁹In *Ashe v. Swenson*, this Court stated that "if collateral estoppel is embodied in [the Double Jeopardy Clause], then its applicability in a

the petition — whether an acquittal of an offense bars the use of some factual element of that offense at a capital sentencing proceeding — is simply not present on this record. Rather, the real dispute is whether the jury actually found in petitioner's favor on the issue of intent, a matter resolved against petitioner by the Indiana Supreme Court, whose finding is amply supported by the record.

IV. A HOLDING IN PETITIONER'S FAVOR WOULD ESTABLISH A "NEW RULE" WHICH CANNOT FORM THE BASIS FOR HABEAS CORPUS RELIEF.

Finally, this Court should not grant Schiro habeas relief on his claims because to do so would amount to the retroactive application of a "new rule." *See Teague v. Lane*,

particular case is no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact we must decide through an examination of the entire record." 397 U.S. at 442-43 (citations omitted). This statement, however, was plainly *dictum*, in that the Court was not confronted with a state court finding interpreting a jury verdict so as to not create an estoppel in any event (the situation in *Hoag*). Moreover, even on its own terms, it is unclear whether the statement was intended merely as a rejection of the "fundamental fairness" standard of *Palko v. Connecticut*, 302 U.S. 319 (1937), which the Court had recently overruled, or whether it was also intended as a statement of the standard of review that this Court should apply to state court findings. Finally, to the extent that the statement suggests that subsidiary findings of historical fact (e.g., what did the jury decide), as well as the ultimate conclusions flowing from those facts (e.g., the verdict creates no collateral estoppel or double jeopardy bar), are subject to independent federal review, it is inconsistent with *Miller v. Fenton*, 474 U.S. at 117, which held that, even where the ultimate conclusion (voluntariness of a confession) was subject to independent federal review, subsidiary findings of historical fact underlying that conclusion are not. Nor does such "an issue lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Id.* at 113.

489 U.S. 288 (1989) (plurality opinion). Adopting the *Teague* plurality's view, this Court has held that a case decided after a defendant's conviction and sentence became final may not provide the basis for federal habeas relief if it announces a "new rule." *Gilmore v. Taylor*, 508 U.S. ___, 113 S. Ct. 2112, 2116 (1993).³⁰ Indeed, when a case comes to this Court on federal habeas review, this Court must determine "as a threshold matter" whether the relief sought by the prisoner would create a "new rule." If so, this Court will not announce such a rule in the case. *Graham v. Collins*, 506 U.S. ___, 113 S. Ct. 892, 897 (1993); *Penry v. Lynaugh*, 492 U.S. 302, 313, 329 (1989).

Schiro seeks the announcement of such a "new rule" in this case.³¹ As this Court has held, a "new rule" is one that was "not dictated by precedent existing at the time the defendant's conviction became final." *Gilmore*, 113 S. Ct. at 2116 (quoting *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (emphasis in original)):

Because the leading purpose of federal habeas review is to "ensur[e] that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of th[ose] proceedings," we have held that "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts." This principle adheres even if those good-faith interpretations "are shown to be contrary to

³⁰Schiro's conviction and sentence became final under *Teague* in 1983, when this Court denied certiorari on the direct appeal, *Schiro v. Indiana*, 464 U.S. 1003 (1983). See *Graham v. Collins*, 506 U.S. ___, 113 S.Ct. 892, 898 (1993); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989).

³¹Of course, a rule can be "new" even if based on a long-established constitutional guarantee such as the Double Jeopardy Clause. The test is "meaningless if applied at this level of generality." *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

later decisions." Thus, unless reasonable jurists hearing petitioner's claim at the time his conviction became final "would have felt compelled by existing precedent" to rule in his favor, we are barred from doing so now.

Graham v. Collins, 113 S. Ct. at 897-98 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990), and *Butler v. McKellar*, *supra*) (citations omitted; other alterations by the Court).

Schiro's position would require this Court to hold for the first time that an original capital sentencing hearing is a second "trial" of issues raised in the guilt phase, and that conviction of one equivalent theory of murder operates as an acquittal of another even where the jury was told to return only one verdict. As demonstrated in Part I above, such a holding is not "dictated" by *Bullington* and would require a radical extension of the "implied acquittal" doctrine of *Green* and *Price*. Respondents are unaware of any published case prior to 1983, when Schiro's conviction and sentence became final, that applied *Bullington*, *Green* or *Price* in such a novel manner. Therefore, it cannot be said that reasonable jurists would have felt compelled by existing precedent in 1983 to rule in Schiro's favor.

Nor do the two narrow exceptions to the "new rule" doctrine apply here. The first exception permits retroactive application of a new rule that "places a class of private conduct beyond the power of the State to proscribe, . . . or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Graham v. Collins*, 113 S. Ct. at 903. Obviously the new rule sought by Schiro would not decriminalize the killing of rape victims, nor would it prohibit imposition of capital punishment on killers of rape victims or even those found guilty of felony murder during the course of a rape.

Schiro's reliance on double jeopardy principles does not change the application of the first exception to the "new rule" doctrine.³² Arguably the first exception might require retroactive application of a new rule of double jeopardy law that "prevent[s] a trial from taking place at all," *Robinson v. McNeil*, 409 U.S. 505, 509 (1973), or which bars the state "from haling a defendant into court," *Menna v. New York*, 423 U.S. 61, 62 (1975).³³

By analogy, this Court has held that double jeopardy, like other procedural protections, is generally waived by an otherwise valid guilty plea *except* "where on the face of the record the court had no power to enter the conviction or impose the sentence." *United States v. Broce*, 488 U.S. 563, 569 (1989). In defining the exception, *id.* at 574-75, this Court relied on cases holding that the constitutional violation at issue prevented the very initiation of further proceedings against the defendant. *Menna, supra* (double jeopardy precluding retrial); *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (due process/prosecutorial vindictiveness).

But Schiro's new rule would not bar the state from holding a sentencing hearing at all — he does not argue that

³²The circuits are split on the issue of whether a new rule of double jeopardy law fits within the first *Teague* exception. Compare *United States v. Salerno*, 964 F.2d 172, 177-78 (2d Cir. 1992) (refusing retroactive application), with *Johnson v. Howard*, 963 F.2d 342, 345 (11th Cir. 1992); *McIntyre v. Trickey*, 938 F.2d 899, 903-04 (8th Cir. 1991), vacated on other grounds sub nom. *Caspari v. McIntyre*, 112 S. Ct. 1658, on remand, 975 F.2d 437 (1992), cert. pending, No. 92-1465 (pet. filed Mar. 10, 1993; see 62 U.S.L.W. 3033). All of these cases dealt with the now-defunct new rule of *Grady v. Corbin*, 495 U.S. 508 (1990), which was overruled in *United States v. Dixon*, 509 U.S. ___, 113 S. Ct. 2849 (1993).

³³Thus, for example, the new rule announced in *Bullington* might receive retroactive application because it wholly bars a second capital sentencing hearing where the defendant was "acquitted" of the death penalty at the first hearing.

the state was prohibited from seeking the death penalty on the basis of other aggravators — it would merely preclude redetermination of elements decided at the guilt phase. Thus, his proposed rule is in the nature of a procedural protection rather than a bar to trial, and therefore does not fall within the first exception.³⁴

The second narrow exception permits retroactive application of "watershed rules of criminal procedure," those "without which likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311-14; see *Butler v. McKellar*, 494 U.S. at 416. Such rules are rare, for it is "unlikely that many such components of due process have yet to emerge." *Teague*, 489 U.S. at 313.

A rule that qualifies under this exception must not only improve accuracy, but also "alter our understanding of the *bedrock procedural elements*" essential to the fairness of a proceeding.

Sawyer v. Smith, 497 U.S. 227, 242 (1990) (quoting *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J. concurring) (emphasis added in *Teague*))).

The double jeopardy rule sought by Schiro is not a procedure "central to an accurate determination of *innocence or guilt*." *Teague*, 489 U.S. at 313 (emphasis added). The primary goal of double jeopardy is to prevent the "embarrassment, expense and ordeal" of a second trial. See *Green*, 355 U.S. at 187-88. Although a second trial marginally enhances the possibility that a defendant will be

³⁴In Schiro's case, of course, application of the new rule would have the effect of eliminating the only aggravator relied upon by the trial court in sentencing him to death (if there had in fact been an acquittal at the guilt phase). The Court, however, must examine the general "categorical" nature of the new rule in determining retroactivity, see *Penry*, 492 U.S. at 329-30, not its effect in an individual case.

found guilty, *id.*, accuracy is not the "central purpose" of the Double Jeopardy Clause.³⁵ Indeed, the Double Jeopardy Clause applies to bar a retrial of an acquitted defendant, even if the acquittal rests on an "egregiously erroneous foundation." *Martin Linen*, 430 U.S. at 571 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)).³⁶

Finally, this Court should refuse to announce a new rule in this case even though the respondents did not raise the new rule doctrine in the lower courts. In *Teague* itself, where the retroactivity of the petitioner's fair cross section claim had been raised only in an *amicus* brief, this Court noted that "*sua sponte* consideration of retroactivity is far from novel." *Teague*, 489 U.S. at 300 (citing *Allen v. Hardy*, 478 U.S. 255 (1986), which ruled on the retroactivity of *Batson v.*

³⁵As one court of appeals has pointed out in this context, the advantages of rehearsal and improvement of one's case on retrial accrue equally to the prosecution and the defendant. *United States v. Salerno*, 964 F.2d 172, 179 (2nd Cir. 1992).

³⁶*Teague's* "central to accuracy" exception is strongly related to the "miscarriage of justice" exception reserved in habeas cases where the petitioner has abused the writ or waived an issue by procedural default. Both exceptions are based on considerations of federalism, comity and finality, as well as the historic function of habeas corpus to provide relief from unjust incarceration. Thus, the *Teague* plurality cited *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), and *Murray v. Carrier*, 477 U.S. 478, 496 (1986), in fashioning the second exception to the "new rule" doctrine. *Teague*, 489 U.S. at 313. Those cases make it clear that "actual innocence" is the focus of the inquiry. At no point in this case has Schiro made a colorable claim that he is "actually innocent" of the death penalty. Cf. *Sawyer v. Whitley*, 505 U.S. ___, 112 S. Ct. 2514, 2517 (1992) (one is "actually innocent" of death penalty only if clear and convincing evidence shows that, but for the alleged error, no reasonable fact finder could find him eligibility for penalty). The evidence in this case leaves no doubt that Schiro purposely killed his victim to prevent her from reporting the rape. Schiro's insanity defense was rejected by the jury and the trial judge. Thus he cannot establish that the accuracy of the trial court's finding that he intentionally killed the victim would be affected by the newly announced rule he seeks.

Kentucky, 476 U.S. 79 (1986), even though the question was not presented in the petition for certiorari or addressed by the lower courts).

As noted above, the "new rule" doctrine is deeply rooted in the important considerations of comity, federalism and finality attendant to all collateral review of state judgments. *Teague*, 489 U.S. at 305-10; see *Butler v. McKellar*, 494 U.S. at 412-14; *Gilmore v. Taylor*, 113 S. Ct. at 2116 (new rule principle "effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts."). It is thus analogous to other nonjurisdictional, comity-based rules that this Court may consider *sua sponte*. See *Granberry v. Greer*, 481 U.S. 129 (1987) (exhaustion of state remedies); *Younger v. Harris*, 401 U.S. 37, 40-41 (1971) (abstention); cf. *Schlesinger v. Councilman*, 420 U.S. 738, 743-44 (1975) (exhaustion of military administrative remedies).

In this case Schiro did not even raise his double jeopardy or collateral estoppel claims until his second state petition for postconviction relief, though the claims were plainly available on direct appeal.³⁷ Even then, and at every subsequent level, they were only one of many issues raised and briefed by him. They were never briefed at length or with clarity; the court of appeals did not even perceive that a separate collateral estoppel claim had been made. (J.A. 196-97 n.7.) The respondents consistently argued that the issue was controlled by a Seventh Circuit decision, *United States ex*

³⁷Schiro's failure to raise his double jeopardy claim until his second state postconviction relief petition does not act as an absolute bar to this Court's consideration because the Indiana Supreme Court ruled on the merits of that claim. E.g., *Harris v. Reed*, 489 U.S. 255, 261 (1989). However, that failure is certainly relevant to concerns of finality and comity that form the calculus of whether the new rule Schiro seeks should be applied to collaterally attack the Indiana Supreme Court's judgment.

rel. Young v. Lane, 768 F.2d 834 (7th Cir.), *cert. denied*, 474 U.S. 951 (1985), and both the district court and court of appeals agreed. (J.A. 171, 196).

It was not until the case was presented to this Court that it became clear that Schiro is seeking the announcement of a new rule. Now that this is apparent, this Court should effectuate the policies underlying *Teague* and refuse to announce such a rule in this habeas corpus case.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals affirming the denial of the writ of habeas corpus should be affirmed.

Respectfully submitted,

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APPENDIX A

TRANSCRIPT OF FINAL ARGUMENTS AT THE GUILT PHASE

MR. ATKINSON: Thank you. If it please the Court, ladies and gentlemen of the jury, Mr. Keating: My style, as I told you when I first spoke to you at the beginning of this trial, is not to say a lot. My function in this trial is to produce for you evidence from which you can make a judgment. The prosecutor has a duty under the law to prosecute the guilty and to protect the innocent, and I feel that sometimes it's inappropriate for me to go to great lengths to persuade anybody as to any particular version of anything. However, in the conduct of a trial you do have two sides ably represented by counsel, and in the theory of justice that we have, if we have twelve impartial people, who are selected on the basis of their freedom from prejudice, and their commitment to doing justice, the theory goes that if each side is ably represented there is a collision, a crashing together of forensic combat, a war of sorts, from which conflict you can somehow sort out truth and justice, and that necessarily then brings me to just not producing the evidence and letting the evidence do the talking, which I do, but also at the end of a trial I attempt to call your attention to some things that maybe you've overlooked, or maybe you haven't considered, or maybe aren't fit right together into a perspective in your mind. It's not my intention to tell you what to do. It should not be the intention of anyone involved in the trial process to invade your province. You now have the serious part of the case to deal with, and that's sorting it out and deciding what to do with it. That's yours alone. The responsibility belongs not to the Judge or Mr. Keating or I, and along these lines, only to illustrate to you the way the evidence may fit together, I would make some observations. We have here maybe almost

a confession of. I did it. I remember Mr. Keating saying that you might find reasonable doubt as to whether or not the Defendant Thomas Schiro is guilty of the offense charged, that the State might fail to carry its burden of proof. We now at the other end of the trial process find out that there isn't really much serious contention about whether or not Laura Luebbehusen died at the hands of Mr. Schiro. Uh, we do, however, have a couple of serious controversies that you have to sort out. The first one is, what really did happen out there? What can you believe? All of it that we have, directly or indirectly, other than the physical evidence itself is within the control of Mr. Schiro. He made a statement to Ken Hood. He said to Ken Hood, uh, I killed the girl. I stole her car. I drove it back here by the half-way house. Uh, I did it. It's heavy, I can't handle it. It's a responsibility that's eating away at me. I'm upset and nervous, whatever. He admitted no detail. He told his lady in Vincennes, Mary Lee, that he had done it also. He didn't tell her right away. He was nervous, he was upset, he was worried about it and he shared it with her. Mary Lee's reaction, if you'll recall, is that she didn't tell anybody. They had discussions about it, uh, they discussed it, and he told her a version of what happened. Uh, you heard from Dr. Osanka. Dr. Osanka, sitting up there in that chair, uh, told us things that Mr. Schiro had told him after hours and hours, I think it was fifty hours at a hundred dollars an hour, of conversations and interviews, plus all these other activities, Mr. Schiro kept telling him more things and more things and more things. This is, again, all after the event. My humble suggestion to you is that evidence within the control of someone who is seeking to avoid the responsibility for that harm which he has caused may be suspect. The best evidence you have in this case, to my way of thinking, is in that box that came from the crime scene that's not within the control of the manipulative acts of Mr. Schiro. What do we have? Well, we have Mr. Schiro's coat on which there is blood consistent with that of Laura

Luebbehusen, which blood is not consistent with the blood of Mr. Schiro. We have that. There were no fingerprints. That is something, you might say, well, gee, they don't have any fingerprints, they can't link the crime to Mr. Schiro. That's not quite true, because if you recall what Mary T. Lee told us, Mary Lee told us that he was wearing gloves. She took those gloves, not originally to the police, but she took those gloves and cut them up into little bitty pieces and washed them, because they had blood on them. It was only after the police found Mary Lee that she did anything in furtherance of her civic responsibilities, she gave them a statement because they were there, a signed statement, and she told them, at that time, what Thomas Schiro had told to her. You need to understand on that statement, apparently she's looking to protect Mr. Schiro here also. Why would I say such a thing? Well, I remember her testifying, I remember her testimony well, I remember her state of agitation as she told of the bad things that Mr. Schiro did in that house. I remember how she became more relaxed and calmed down when she talked with Mr. Keating. She talked about the same kinds of things that Mr. Osanka told us about. Mr. Osanka, you will recall, is the professional witness who was getting a hundred dollars an hour for his activity. Yeah, well, O.K., I had a professional witness too, and I assume that I'm probably going to get charged about as much, but at least I don't have fifty hours worth invested. But, interestingly enough, when Mary Lee got back to something she understood, and was willing to say, she settled down, she calmed down and she went right along with the program. A very creditable performance, a very convincing performance. I kind of even accepted a lot of it myself. Until I said, how many times did you visit with, uh, Frank Osanka? One time. No, no, really how many times did you have conversations or talk, visit with Frank Osanka . . .

MR. KEATING: To which the defendant would object, your Honor. I hate to interrupt . . .

MR. ATKINSON: Certainly, go ahead.

MR. KEATING: . . . but, that question was not asked. How many times did you talk with, have conversations with.

THE COURT: The question was proper . . . how many times did you see Dr. Osanka, and the answer was once, I believe.

MR. KEATING: O.K.

MR. ATKINSON: Well, she answered on more than one occasion. She answered it on more than one occasion. I asked the question again probing for more information. I'm sure counselor will allow me that. And, at that point, she said, one time. Dr. Osanka testified that he had sixteen hours worth of communication. Now I can almost count on Mr. Keating getting up here and saying, oh, hey, really that doesn't make any difference, there was ambiguity in what that lawyer said, that prosecutor, that nasty guy, uh, he didn't frame his question carefully enough. Well, I submit to you that the lady showed how candid she was, and she showed where she was from when she didn't tell this jury that's going to decide this, that there were sixteen hours worth of conduct . . . contact, that there was a telephone put in, apparently at Mr. Osanka's own expense, uh, at that time, I suspect he'll be reimbursed. She didn't bother to tell us about the tape recording, and she didn't tell us about the intensive nature of those communications and how it was that she got her presentation put together. Well, back to Mary Lee. What can you count on from Mary Lee? You can count on from Mary Lee some element of truth in that which Mr. Schiro told her about the crime. What you can't count on, and even Mr. Osanka understood that you wouldn't buy it all. What you can't count on is Thomas Schiro having told her, for that first statement to the police to be accurate, all of the things that

happened in the house, because understand he's going back to his lady, his loved one, the person with whom he resides, the person upon whom he was dependent for a sexual relationship, the person that obviously he has some feelings for, any way you want to play it, he obviously has some feelings for, he's not going to go back and tell her exactly what he did when the physical evidence shows that he did something different than have a consensual cooperative liaison with a lady who at first really didn't want to go along with it, then maybe, you know, they did, and they became friends, and they went out, they drank, and . . . where's that bartender that sold that beer?

MR. KEATING: To which we would object, your Honor. That is a direct comment on the defendant's failure to produce evidence. Defendant has no burden to produce any evidence.

THE COURT: Under no . . . I will state strongly that defendant has no burden to put any evidence whatsoever in here and he is innocent until proven guilty.

MR. ATKINSON: That is absolutely correct. My apologies.

THE COURT: Alright. Ignore any other statements to that effect. You may continue.

MR. ATKINSON: In any event, what is Mr. Schiro going to do? Is he going to go back to his lady, to his loved one and say, well, I went and I knocked on the door, and I said my car was broken down, and I got in the house, and she was wearing a robe, and I hit her, and knocked her out, and she fell on the bed where the blood pooled? You see, Dr. Venable's testified that there was a blow severe enough to cause a loss of consciousness. John Althoff testified that the individual was . . . Laura Luebbehusen was on the bed for a period of minutes for the pooling of blood to occur on that

pillow case. What's he going to do, say that, after I knocked her out, and had my way with her I fell asleep, and when I woke up she had clothes on and was headed out the door and it scared me so I killed her? He had to make it more acceptable somehow, and I suggest to you that his pattern of minimizing things is throughout this whole trial. He minimizes them by saying, I'm sick. He minimizes them by saying, I need help. He minimizes them by, as . . . he manipulated his parents by manipulating whoever it is that he's in contact with. With Mary Lee, I suggest to you, that he minimized what really happened there by bringing it within a framework that she could handle. Hard to believe, but apparently what she could handle from Thomas Schiro was a whole lot of weird. She accepted a lot of behavior of Mr. Schiro, and so maybe she can commiserate with him about sexual things because she already knows he's kinky, she's already accepted that, she still remained within the relationship, and so she can probably handle the kinky sex aspect easier than him going in and killing and striking without any familiarity, O.K.? You don't have to accept any theory I have. I just invite you to look at the physical evidence. The physical evidence is, after a pooling of blood on the pillow case, on the bed, there was a second attack. John Althoff tells us that it was a second attack because there was blood and grab marks on the front of that little peach colored robe. John Althoff tells us that the second infliction of damage is evidenced from the blood on the wall, that she was driven into the corner and repeatedly beaten until she died in the corner, and was then drug out of that room into another room. That matches up with some of what we've been told by Mary Lee. She was wearing different clothing. There had to be a second assault. There had to be time for her to change clothes somewhere. There are missing underpants, physical evidence. They've got an explanation for it. I heard it. Dr. Osanka said that, uh, Mr. Schiro stole her underpants. Another plausible consistent with physical evidence description of what might have

happened, would be that the lady was in a hurry. She came to, she wiped her face on that towel to get the blood out of her face, grabbed the closest clothing nearby, including her roommate's coat that she never wore, grabbed a pair of pants and put them on. It was cold outside, she had to put some shoes on, and split. That's not necessarily what happened, but it is consistent with the evidence in this case, the physical evidence, evidence not within the control of Mr. Schiro. Well, what else do we have? We have a bottle, or what's left of one. We have a shattered bottle. We have an iron, a broken iron. We have a mark in the head of the young lady that matches up with a portion of the iron, and we have a dildo that was recovered, a dildo that was recovered with phos . . . can't say the word, phosphatase on the inside of it. The lady was about to have her period. Dr. Venable's told us she had a ruptured something luteum, corpus luteum, I think it is, which meant that she had just ovulated, that she had just sent an egg on the way. In other words, this was a time when she would be more fertile than other times. It's not unreasonable to assume that the dildo first got introduced into this occasion by this young lady begging, oh, please, please don't. And, when it became clear that it was going to happen, no matter what, she said, please, please don't make me pregnant. Here, don't you have anything to use? No, I don't have anything to use. Well, I've got something, please. That's an explanation. It may not be what happened, but it's consistent with the physical evidence. We have some evidence that it was not a consensual affair, O.K.? If it was consensual, why would there be a note? Excuse me, I want to get it right. If it were consensual, if it were consensual sex, and that's important because for it to have been a rape, it couldn't be consensual. This is not the death penalty phase of this trial, alright? It takes two steps. You first find whether he is guilty or not. If he's found to be guilty of Count Two, or of Count Three.

MR. KEATING: Your Honor, we're going to object to him explaining to them under which circumstances they may move on to the death penalty portion. I don't think that that should enter into their consideration here . . .

MR. ATKINSON: Nor should the fact that if they find that he is guilty here, uh, enter into their consideration as to whether or not there's a death penalty. They're entitled to know, Judge.

THE COURT: The instruction, one of the possible verdicts, is Murder by rape, one is Murder by deviant conduct, and one is Murder.

MR. ATKINSON: I think they're entitled to know. Would you step up to the . . .

THE COURT: Yes . . . you can use . . .
(CONVERSATION BEFORE THE BENCH BY ATTORNEYS)

THE COURT: Alright. You may proceed, and . . .

MR. ATKINSON: In the simplest form, if you vote for a conviction in this part of the trial, it does not automatically impose the death penalty. You get to determine at another time, another hearing subsequent to your finding on the question of guilt or innocence on any count, you get to determine what penalty gets applied, not on the question of guilt or innocence. What we're dealing with at this stage of the trial is whether this man is guilty or not, and if he is guilty, what is he guilty of, alright? If there is no conviction, I'm sorry, if there is no consent, then you may find defendant to be guilty of rape, murder. If there is no consent to deviant conduct, you may find the defendant to be guilty of Deviant Conduct Murder. The reason this note is of a lot of

importance is, it tells us there wasn't any consent. Consent is a defense to the rape part, consent is a defense to the deviant part. Darlene, don't come in, please, I've called the police. That pretty well destroys any idea of consent. Why else would she call the police, other than she didn't consent? We have physical evidence of a car being transported, near the half-way house where Mr. Schiro lives. We have physical evidence of shorts and underwear, in addition to his coat, shorts and a washcloth, with seminal stains on them, from his room. We have, uh, bite swabs, physical evidence that shows the presence of saliva from the nipple or the thigh, and I honestly can't remember which, or if it was both. Some of you do, some of you know, you had a chance to listen to all of the evidence. I had work to do, and didn't maybe get all of my notes right. The point is this, there is physical evidence that supports the fact that this defendant committed this crime. That gets us into a whole new ball game. Once the crime is established beyond a reasonable doubt, if you find that, you still have to struggle with whether or not this defendant should be excused, whether he should be freed from responsibility, by reason of being insane, not medically sick, or mentally insane, uh, within a treatment context, but within the legal definition of insanity. I think we've pretty well established both sides here, what that ball park is, but a couple of things to note in passing; the test is, could he tell the difference between right and wrong? Well, we have, uh, we have Ken Hood, we have Bob Wilkinson, the counselor, we have Dr. Abendroth, we have the probation officer, we have, uh, two court appointed psychiatrists, who are medical doctors, all saying, without any fail, that Mr. Schiro could tell the difference between right and wrong; he was capable of conforming his conduct to the requirements of law, at the time this offense occurred. Doctors testified as to the time of offense. The other people testified as to the time they knew him, while his employer told us he was rational, told us that he didn't have any trouble verbalizing, told us that his work

was good. The people around Mr. Schiro, with only one exception, the people around Mr. Schiro, with only one exception, said that he was competent, that he was legally responsible, if you want to attach significance to what they said. Mr. Schiro, Senior, didn't have that much light to shed on the subject. Mary T. Lee testified just like railroad tracks with Mr. Osanka. Mr. Osanka told you that in his opinion, and I think these words are magical, in Mr. Osanka's opinion that what he found out in all of that time was consistent with a definition. Mr. Osanka is not a psychiatrist; Mr. Osanka is not a physician; Mr. Osanka is not involved in treating mentally ill people; Mr. Osanka is not in a practice that has a substantial amount of consultation to it. Mr. Osanka is a witness and a public speaker. Dr. Crane did all he could, and he said that the defendant was sane. Dr. Crudden did all he said he had to do. He's been there before; he's made a lifetime of psychiatry; he said the defendant is sane, and when I'm using that word now, sane, I'm talking about legally sane. Dr. Abendroth, who counseled with him over a period of time, found no indication that he didn't know the difference between right and wrong, and found no indication that he couldn't conform his conduct to the requirements of law. Well, is there anything else out there in this case that should suggest to you that Mr. Schiro should be relieved from the consequences of his acts? Well, yes, there's one more shred of evidence, aside from Osanka and Mary Lee, and that's a fellow by the name of Donnerstein, who teaches somewhere, and does experiments. He didn't talk with Thomas Schiro, neither did Dr. Crane, uh, he had access to some tapes of things prepared by Dr. Osanka. Uh, he told us that somehow or another, looking at pornography made Thomas Schiro do aggressive things, and somehow or another got a different definition of sex and right and wrong, and to Thomas Schiro it was O.K. to go out and do those things to people. He recognized that society had a different, a different definition of right and wrong, but he just couldn't bring himself to

conform with it. I think that says something about Dr. Donnerstein's testimony. Uh, when it's all said and done though, you can't just rely upon what one conclusion from one witness, or two conclusions from two witnesses might establish, O.K.? I think you have to go beyond that; you have to look at those things which would cause you to believe whether Mr. Schiro is, uh, legally sane or not. And, the way you do that, I think, is to look for his knowledge of right from wrong. Did he run? Well, yes, he did. . . . in this case. Did he flee from the crime scene? Did he take her car? Did he stick around, did he go to sleep in there? Did he call the police and say, hey, what have I done? According to all that you have heard, what happened was that Mr. Schiro left, he didn't tell anybody, that recognizes . . . you know, for a day or two. That recognizes, I think, or sets up that he recognizes the difference between right and wrong, what he's done. Uh, he went off to see Mary, and told her he didn't want to tell Ken, Ken Hood, because . . . he's the last person I want to tell. All along here we've got a pattern of avoidance of responsibility. If he didn't know he had responsibility, he wouldn't avoid it. One curious thing in this regard, Dr. Osanka said, up there on the stand, in response to Mr. Keating's question, would this crime have occurred if there had been a policeman at, I think Mr. Keating said, at the defendant's armpit, elbow, armpit, makes no difference. Uh, Dr. Osanka said, I think he would have taken the policeman out, and then he'd have gone ahead and done it. Well, you see, if this man were mentally ill, suffering from an irresistible impulse, and he didn't know right from wrong, he wouldn't have had to take out the policeman, because the policeman wouldn't have made any difference; he'd have done it right there in front of the police officer; it wouldn't have made any difference. It's like the guy that puts his arm up, it doesn't matter whether he's talking to his psychiatrist, doesn't matter whether he's talking to his mother or a nurse, or some guy on the street, he's got a delusion he's got to carry his arm around like that, or he'll

lose it . . . doesn't make any difference who sees it. You don't have to take out the doctor. It's just there, it's a reality. Dr. Osanka recognized that Tom Schiro had a view of reality that would necessitate taking out the authority figure before he could go ahead with it because it was wrong. What else? He went to his job, he said, I'm going to quit, I'm going to leave town, . . . come back Monday and give you ten bucks I owe you, getting ready for flight . . . flight from what? Flight from the wrong he'd done that he knew was wrong. Peeping. He didn't walk up and stand in the window and peer in at somebody and wave at them because he was doing right things, he hid. He knew it was wrong. God forgive me. Forgive me for what? For something that's wrong. You have to admit this guy, if he did all those rapes that he told about, o.k.? You have to admit that he had to be careful, or he wouldn't have gotten away with them. If you're careful then you've got to know that you're doing something that's not going to be approved of, because it makes a difference. He picks out anybody, doesn't make any difference . . . ah, there's one, I want sex with that one, and goes up on the street corner and has sex with somebody on a street corner . . .

that's delusional, because he doesn't know he's doing anything wrong. If he sneaks around and comes in at night, if he checks someplace out, he goes into this home for example, the Laura Luebbehusen home, first thing he does, he says, oh, may I use your phone. He walks in and looks around and makes sure that nobody is there. Not being completely convinced he asks to use the bathroom, and really sorts it out, that there's nobody there. Nobody there to catch him, nobody there to stop him . . . because what he's doing there is wrong. There's also that same pattern of withholding details, recognition of the wrongfulness of the behavior. When he told Mary Lee, he told her a story, you can find how much of it you wish to believe, and how much of it you don't. When he talked with Walter Abendroth, a person who testified he was in a position of trust and confidence with Mr. Schiro, he

wouldn't tell Abendroth. When we get down to Ken Hood, he wouldn't tell Ken Hood details about the crime. Oh, my, it was too awful. When he talked to the psychiatrist, he said, here's my autobiography. Everything you need is in there. He wouldn't tell them any details about the crime. He wouldn't give them any evidence of his wrongdoing, you see. Well, I heard that Thomas Schiro trusted people who were doctors, and distrusted law enforcement. If that's true, if that's a part of his delusional system, why didn't he give the details to the doctors? Surprise, surprise, the autobiography does not contain anything about the crime. No way the doctor could know. Now, you know, he didn't get the job done with the thirty-seven pager, because he forgot to put in the part about the mannekin, so then he came back with the part about the two pager part, and that way we've got two documents, and we've got the whole story. Dr. Venables told us that Laura Luebbehusen had a broken fingernail, a bite mark on the left nipple, a bite mark on the right thigh, ostensible bite marks, he called them. Dr. Brown connected that up for us, a tear in the vaginal track, or in the vagina that was consistent with the insertion of some object, uh, four contusions or lacerations on the head, a contusion on the neck, indicated that the wounds to the head were from blows, as opposed to falling, and that she'd died of strangulation. He also told us that she had a ruptured corpus luteum, I guess I was right. We put on some evidence about Darlene Hooper. We put on some evidence about where she was, where she came from, where she went, where she spent the night, followed her through from the time she got off work. At the beginning of the trial, there was a note there where they'd had some kind of a disagreement, but, uh, that was over, and Darlene Hooper told us, again on the question of consent, that Laura Luebbehusen was a practicing lesbian, that the dildos in the house were not for use on Laura, that they were for use by Laura, for the benefit of Darlene Hooper. She told us that Laura was repulsed by the idea of sex with a man. She told us also that Mr. Schiro

was a stranger. With respect to the mental condition, I made some notes, I'll share them with you. I've probably said to you already what I think about this, in an abbreviated form, but I'll take you through a step at a time. Kenneth Hood told us, he's the director of the half-way house, told us that he thought that Mr. Schiro needed drug and alcohol therapy, said he was rational. He said he was nervous, of course, nervous, very nervous and agitated, calmed down as he began to tell it, but otherwise he was rational. He could talk, communicate. Robert Williamson, the counselor of Mr. Schiro, another guy in a position of trust and confidence, you know, took him to the bus station, rode with him in the car, talked with him. . . . indicated that he got along O.K. with the guys. This is a fellow that doesn't have any friends, you see, got along O.K. with the guys, he didn't have any close friends at the half-way house, but had some arrangements or relationships outside. He had a positive view of his parents did mention bondage, "b" and "d", I don't remember what the "d" part is, but bondage, on one occasion. Never mentioned peeping or anything like that, said he was rational, said he cleaned up a lot since he saw him last. Bob Wheeler was his employer, said he was a good worker, and he'd never smelled alcohol on his breath. Two and a half months he had a chance to observe him; said he did know the difference between right and wrong, could conform his conduct to the requirements of law. Dr. Abendroth read us a letter, a letter that Dr. Abendroth didn't know was going to help Tom, with respect to the avoidance of responsibility. In fact, Dr. Abendroth set up ground rules: I'll see you, I'll talk with you, I'll get along with you here in this counseling program only if you understand I won't do anything to get you out of trouble. Dr. Abendroth wrote a letter, the letter is significant because it shows, without any reference to this trial, what Dr. Abendroth thought about the mental condition or mental state of Thomas Schiro. That's probably worth touching on for a moment. Tom has been able to work on the changes he needs to make,

for example, he's trying to develop new ways of communicating with his parents and girlfriend, attempting to overcome shyness, develop new friends, asserting himself, saying "no" to old acquaintances that want him to smoke pot or drink booze; we talked about possible educational goals; been interviewing for jobs. I believe Tom is developing insights regarding his past behavior that are helping him to understand himself and his feelings. Needless to say, I am proud of the movement that Tom has made in the last several months. As I'm sure you're aware of, Tom has been scared since this episode with the law. I believe it's causing Tom to examine his lifestyle and to decide to find ways of behaving that are not self destructive or destructive to others. If Dr. Abendroth had found, his testimony was, if he had found any indication of schizophrenia if he'd have found any indication of mental illness, he would have referred Tom to people who could do with him what needed to be done, who could deal with that. He wasn't equipped for it, he was primarily a counselor doing counseling, uh, to the community on a limited basis. His occupation there was as a counselor for people on campus, but he was doing public work as well. He said, I found no indication that he couldn't tell right from wrong, that he couldn't conform his conduct, no indication of mental illness. Dr. Crudden, Dr. Woods, Dr. Crane, all testified. There was nothing delusional there. There is no symptomology, there's no evidence of a psychotic state. There's nothing about his mental condition that should excuse him from the consequences of this crime. I think what I'll do next in the spirit of being very brief, is to allow Mr. Keating to make some comments. Then I will respond to them. I will, uh, reserve, if it please the Court, the opportunity to show one exhibit to the jury.

THE COURT: Fine.

MR. KEATING: May it please the Court, Mr. Atkinson,

ladies and gentlemen of the jury: I, as well, hope I will not be too long, for two reasons. I think you have probably had your fill of mental health professionals, psychologists and psychiatrists, and I'm sure the last you want to hear are a couple of lawyers preaching to you. And, there's a second reason I'm going to be brief. I have caught Mrs. Johnson's cold, so, I'm going to have to cut it short here, because I'm having a lot of trouble breathing. But, what I want to do . . . I don't want to review the evidence with you. You folks have sat here . . . you're all intelligent people, and you heard the same things I did. You heard the same things Mr. Atkinson did. In fact, and I think I've finally figured it out; see, we sit on one side of the witness and he sits on the other. We hear things at an angle, because I didn't hear some of the things he heard, and he heard them differently than I did, and I think maybe that's why you people are in the middle, so maybe you can hear them correctly. So, I'm not going to go over all the evidence with you. The things I did hear, and I'm a little different than Mr. Atkinson. I'll just briefly state, I thought Mr. Osanka was also a doctor. I didn't know if it was Dr. Abendroth and Mr. Osanka, but . . . again, you know, we're on the side, you're in the middle. And, I heard him say that Mary T. Lee didn't do anything until the police showed up. I thought I heard, and again, you people are in the middle, you didn't hear it on an angle, but I thought there was testimony of how she called Dr. Abendroth and some other things that she had done, and I heard Mr. Atkinson go on and tell you why she isn't a good person to believe, and why her word should not go, and why you shouldn't pay any attention to her, and how she's really out to help Tom, she still secretly loves him. Well, I know we heard this, but I also saw the pain on her face when she talked about Willy, and remember, she didn't find out about all this until all this had happened. She did not know what was being done to Willy. And, I saw the pain on her face. Is that the kind of person that's going to lie to help somebody, after what was done? I also heard a girl

that hasn't had a drink for a year, after being an admitted alcoholic. But, I'm not going to dwell, and I'm not going to sit here and tell you how I heard things differently, because you probably heard them correctly. What I am going to do is just maybe give you, like Mr. Atkinson, maybe a few things to think about. The thing I'd like to maybe do is suggest how you should go about your deliberations. Now, I'm no expert on this. I don't know any better than you all do, but, you'll have to go back there and try to figure out which one of eight or ten verdicts, I believe there are ten, that you will return back into this Court, and I believe the Judge will explain every one of them to you, and instruct you on them. And, I think perhaps the best way, maybe you can go about this, is take these issues one at a time, because there's a logical sequence, I think, to them. I think first of all what you ought to do is sit down and decide the issue of insanity, because depending on that, you may just stop there or go on. Now, the Judge will instruct you on this, but I'm going to read it because I want to maybe talk to you a little bit about it. It says that a person is not responsible for having engaged in prohibitive conduct, committed a crime, if, as a result of a mental disease or defect he lacks substantial capacity to either appreciate the wrongfulness, appreciate the wrongfulness of the conduct or conform his conduct to the requirements of law. Now, let's look at those things one at a time. It's by a preponderance of the evidence, that issue. Is it more likely true than not that he was insane? Have the scales tipped ever so slightly one way or another on that issue? A preponderance of the evidence. In that definition I heard no mention of DSM. I heard no mention of psychosis. I heard no mention of any of these other terms we've all been arguing about as to what they mean, and all the green books we've had out, all the pages we've read. The DSM, I think Dr. Crane is right, probably very few people refer to it until they come into Court, and apparently we all bring it, including the Prosecutor, but all that is is so psychiatrists and psychologists can talk to one

another, they can talk among themselves. When one of them says, this person is suffering from whatever, then it's generally understood what that is. It's no bible. It's no bible that helps you determine what is mental disease or mental defect. You are the judges of that. You are the jury. You determine what is a mental disease and what is a mental defect, and you have to determine, based on what you've heard, whether or not a mental disease or a mental defect is present. Not the DSM, not all the experts, you. The Judge will instruct you on mental disease and mental defects, and you'll hear this again, but I'll read it. The term mental disease is generally used to denote a condition capable of either improving or deteriorating, and the term mental defect generally is used to denote a condition which is not considered capable of either improving or deteriorating, and which may be either congenital, or the result of an injury, or the residual effect of a physical or mental disease. So, that's what the Court will tell you about that term. You are the ultimate judges. What is important is not what we label it, what the symptoms are called, what we can look in a book and point to something. The important thing is whether or not the symptoms exist, whether or not there is evidence of a mental disease or defect. And, do they exist? Well, where do we start? A good place to start in determining whether or not there's a mental disease or defect is with the crime. What do we have then? We have a violent assault, very violent, a very brutal assault upon a woman, and if that weren't enough, what else do we have. We have, after death, I'm not even going to go into it all, but you know what I'm talking about. After death, you saw the picture of the body. Someone, after death, sexually abused that body. Now, we start from there. Is that normal? For crying out loud, is that normal activity? Is that the kind of thing that a normal person does? We start with a crime, and from there where do we go? Well, we go over to Tom Schiro and what do we find? We find a twenty year old, twenty years old, just out of his teens, a high school

dropout, with limited social experience, limited job performance. And, then, and this is a person right here, this twenty year old dropout, that the Prosecutor would like you to believe is pulling the scam. He's a person the Prosecutor would like you to believe, got experts in here from Wisconsin and Evansville, experts from Illinois who made fools of themselves by all this stuff, because he's outwitting them all. This twenty year old high school dropout is putting it over on us all, and he's manipulating us. He's manipulating the doctors and he's manipulating everyone here, and they want you to believe he's trying to manipulate you. They want you to believe you're being manipulated, and they want you to believe it's a scam. Well, is it a scam? Somebody pulling something over somebody's eyes? Right over here sits Mr. Schiro. His wife has been in the Courtroom, they have been available. Who talked to them? Who talked to his parents? Who talked to the people who raised him and attempted . . . in attempting to determine whether or not this man could appreciate the wrongfulness of his conduct, conform his conduct? Who talked to them first? Who spent fifty dollars [sic.] on interview with him? Not an hour and a half, not an hour, reading over an autobiography, who spent fifty dollars [sic.] on interviews? Who talked to Mary Lee? Mary Lee was a prosecution witness. Mary Lee was called by the State of Indiana. They had to know where she was. She's always been there. They could have talked to her just pick up the phone, she seemed quite eager to talk. Say, Mary Lee, I'd like to talk to you, about Tom. Do you know anything that could be important? They could have done that? And, who did it? Who had to do it? Well, the Prosecutor, on voir dire, I remember, asked someone, I don't know if it was anyone on this jury, but, said, do you believe that maybe you know more about your wife than any . . . her doctor would, because you live with her? I remember him asking that question. Who knows more about Tom than the person he lived with? She was there. She was available, no one talked to her. No one

bothered checking anything out, what did they . . . do and said. Well, they got angry because they . . . well not angry, maybe, but a little perturbed because he was talking faster than they could write, they couldn't get it all down. So, they brought him in in manacles, and said, O.K. open up to the . . . tell me everything I should know. And, they gave hour interviews and they gave an hour and fifteen minute interviews. And, now, they come into Court and they say, no, nothing wrong with him. Nothing wrong with him at all. I know because I did plenty of work. They didn't talk to the people who had the most information. The prosecutor wants you to think, the prosecutor asked you to believe that that's part of the scam too. But, they were there, they could have talked to him early. They even brought one as a witness. They said, Tom Schiro is . . . he's not insane, he's a manipulator. I think you people are the ones being manipulated here, and not by him. You're being asked to excuse poor work because a person is a medical doctor. You're being asked to overlook what should have been done because a man has M.D. behind his name. Now, you and I wouldn't get that kind of break, but they're asking you to give a person that kind of break. They're saying, well, we ought to accept his opinions. He is an M.D., and he must know more. Well, sure he may know more about medicine, but all the knowledge in the world doesn't substitute going out and getting the facts. But, they're asking you to rely on those opinions. And, Dr. Osanka, I think it is Dr. Osanka, is not infallible, of course not. We're talking about opinions here, opinions of mortal men. Let's check out the background, compare what has been done in both cases. And, don't accept anyone's opinion, don't accept any expert's opinion, but use them. And, use them as you feel they are believable. The second part of that test is whether or not he could appreciate the wrongfulness of his conduct, and not whether or not he could, whether or not he lacked the substantial capacity to do it. Did the Defendant lack the

substantial capacity to appreciate the wrongfulness of his conduct? Dr. Osanka, Dr. Donnerstein said, the pattern is clear, premature exposure to pornography and continual use with more violent forms created one thing, created a person who no longer distinguishes between violence and rape, or violence and sex. I think Dr. Donnerstein testified that something Tom said on one of the tapes, rape is sex. There's no distinction there. Violence is sex. Violence in some of the most . . . honestly disgusting forms, is sexually arousing to him. Rape is sex. Violence is sex. It's a result of pornography addiction. Mary Lee described it as the same as breathing to him. Some of you women may feel somewhat threatened by this case, and I think you should for this very one reason. I think the evidence shows there are one or two movies out there that could directly endanger your safety; I really do. But, that's really not what we're here to decide. We're here to decide what effect it had on Thomas Schiro. And, I think as far as that goes, the appreciation of the wrongfulness of his conduct, is from my side, from my angle, is pretty clear. He could not appreciate the wrongfulness because to him it was not wrong. His mind was to the point, his values were to the point where there was no distinction there. That's a hard thing to accept. I think even Dr. Osanka was honest enough to say, that's a hard thing to say. Because maybe he did know what society says, but read the insanity statute and read the text. The third part is whether or not it is more likely true that he could not conform his conduct to the requirements of the law. You heard, and I think no one even has to tell you this, there was a sexual pressure inside of him. It started, and it grew, and it was fed by pornography, and it was fed by alcohol, and it was fed by drugs, and it had to be released. It had to be released. And, how the masturbation, and I'm not talking about what we all think about masturbation, although that happened also. He used people to masturbate. Mary Lee, again the person who should know him best, said, testified as to his sexual technique. She said,

she felt like his "jackoff" machine. He used people to masturbate and finally he used the ultimate form, and that was a dead body. He could not control himself. His sexual urge had to be released. It had to be gotten over with, and the way to do that was through, in his mind, various forms of masturbation. To us, a lot of it is very disgusting, violent assault against people. To him it was masturbation to relieve his sexual pressure. He could not control, could not control. Mary Lee testified masturbation to him, again, was like breathing. He had to have his sex. There were times before when he was out raping every night, he was home masturbating eight to ten times a day. What strange urge sent him out. Was it the books, was it something else? We'll never know. But, the pressure was there constantly. The pressure had to be released constantly; and, he did . . . until this happened. Until finally it resulted, again, in the ultimate form. And, again, there's a culmination of things here. We have the desire to relieve sexual pressure, we have the excitement to violence, the excitement through pain, we have the necrophilia, the tendency to somehow to get sexual enjoyment from something that's dead. All this culminated in that house that night. It all came together, it all came together in a very unfortunate way. Dr. Donnerstein showed . . . or spoke of "snuff films". That night on East Tennessee Tom Schiro finally became the "snuff film" king. It all came together and he was, although not probably consciously in his mind, it was all leading to that point, and finally there was a "snuff film" made by him. That is the definition of insanity; those are the considerations. And, remember, it's (inaudible) the substantial capacity to do these things, not whether or not on isolated occasion perhaps he did. Did he have a substantial capacity to do it, or was that substantial capacity destroyed, affected by a mental disease or a mental defect. It's your decision. You've heard expert testimony only to aid you. Take what you think is valuable and reject the rest. In your own mind, take that test, look at the facts and determine. I

believe the evidence shows that he did not have, he did have a mental disease, a defect, and he did not either appreciate the wrongfulness of what he was doing, or he did not, he could not conform his conduct. But, again, I'm at an angle, you're in the middle, and I'm not going to attempt to tell you what to do. After you decide that issue, you have two choices: yes, he is not responsible by reason of insanity; no, we disagree, the scale did not tip, it's not more likely true than not. And, then in your determination, he's sane. Once you reach that point then you must consider the guilty, but mentally ill verdicts. And, as to each crime charged, you are also authorized to find that he was guilty but mentally ill at the time, as to one of those crimes. And, again, the Judge will read this to you, but I'll do it because there's going to be a lot of instructions, very frankly, and perhaps you're going to have a hard time understanding them all as they come to you. On the guilty but mentally ill verdict, mentally ill, you'll be instructed, as this term is used in such a verdict, means having a psychiatric disorder, which substantially impairs the person's thinking, his feeling, his behavior, and impairs the person's ability to function. The burden, the Judge will instruct you, is on the State of Indiana to prove that that is not the case. They have the burden to show that he was not mentally ill. If you believe that he was, or you have a reasonable doubt as to whether or not he was, then your verdict, in the event you do not find he was insane, your verdict shall be guilty, but mentally ill, of a crime. I'm not going to talk on that much at all. You've heard all the evidence, and folks, if Tom Schiro is not mentally ill, as I've just read the definition to you, then may God help us all. If this twenty year old high school dropout does not have something wrong with him, is not mentally ill, then we are all in a lot of trouble. I don't think there's any disagreement on that. I don't think I've heard any expert witnesses from whatever background, whatever materials, or whatever they looked at or who they were, I don't think I heard any of them

say that he wasn't mentally ill, or sick. He has a lot of problems. And, that's all I'm going to say about that, and that doesn't come unless any, to my way of thinking, that wouldn't come until you've decided insanity issue. The next step would be, then, to determine guilty of what. There are three crimes charged. There is murder, and the Judge will tell you, read you the statutes on these. There's murder, there's murder while attempting, or . . . attempting or committing rape, and murder while attempting to or committing criminal deviant conduct. There are also what are known as lesser included offenses. You have the three charges, and then included within those charges are other crimes, which he, perhaps could be found guilty of. The Judge will read those to you, too. They will be voluntary manslaughter and involuntary manslaughter. Listen to those definitions, because this is what you're going to be dealing with. He will also instruct you that if, while deliberating, you have a reasonable doubt as to which of two degrees he is guilty of, you should return a verdict of the lesser degree only. In other words, if you're back there deliberating and you say, well, he may be guilty of murder and he may be guilty of voluntary manslaughter, and I have a reasonable doubt. It would be the lesser degree only, the voluntary manslaughter only. The Judge will tell you all this, and probably those who have sat on a jury before may have already heard it. Was there a killing? Sure, no doubt about it. Did Tom Schiro do it? Sure, all this stuff about finger prints and pictures on the floor, and all that was just to keep Mr. Atkinson on his toes, you can't let the man relax. There's no question about it, I'm not going to try to . . . in the words of one country lawyer in Evansville, I'm not going to try and "bamboozle" this jury. There was a killing and he did it. If you come to the point of deciding what he was guilty of, if you get past consent, and you take care of the question of mentally ill, I think there's two things you should think about. I'm just going to let you come out and let you think about them, and let you do with

them what you may. The deviant conduct which, by the charge, was the insertion of an object into the sex organ of the victim, of the decedent, I believe the evidence shows, came after death. What you must then ask, is whether or not at the time he killed her he was attempting to or committing, or actually committing that deviant conduct. Is there a connection between the two? I think the evidence is very susceptible to the construction that it was an afterthought. I don't know, but that's something to think about. As to the rape, it was a rape while committing or attempting to commit . . . or was a murder while attempting to or committing rape? I'm pretty sure I would offend some of you if I said there was consent. I don't know, but there are a lot of strange circumstances. There really are. The evidence showed a lot of strange things. The State would have you to believe that she was struck on the head, layed down on the bed, got up, got dressed, after sustaining a fairly severe head wound, at which point she would have known, somebody means business. After sustaining such a head wound, got dressed, and ran out the bedroom door? Maybe it happened that way, but you people, when you became jurors, did not leave your common sense at home, I hope. Is it common sense to think that someone who has just been brutally assaulted and who has lost a considerable amount of blood on the bed, and obviously at that time is aware of something very serious that's going to be done to her perhaps, would get up, get dressed, or would that person, regardless of the cold, regardless of whether or not he was still out there, head out that door, head down to old 41, a half a block away, new 41, somewhere, and get help. What would be the first thing that would go through your mind? I have to get dressed, or I have to get out of here? Again, I don't know, that's something you people have to deal with. Another thing they talked about is, showing some sort of (inaudible) was this letter, Darlene, don't come in, please, I've called the police. Again, common sense. If you were seriously wounded, someone is going to

do you harm, you'd get dressed and write a note? And, even if you do, even if you are concerned about alerting your roommate, what do you say? Do you say, help? Do you say, don't come in, there's a lunatic in my house? Don't come, there's a madman? Don't come in, there's a killer? No, according to the State, you say, don't come in, please, I've called the police. This note, I think is acceptable to the other interpretation, that that is a left over note from a love squabble. I think there's another letter there concerning some disagreements that she had had with Darlene. I think that's just as reasonable an interpretation of that note as what the State wants. There's all these other bizarre things, and I can't sort them out. I cannot sort them out personally, but you people will have to. There's the question of the beer. Why beer in the can? Lite beer in the trash? It came from somewhere. Tom has an explanation. There's a question of the wine bottle. Somebody drank it. Laura had quite a bit of liquor. How did all that happen? Something to think about. If I would make a statement to you, if I said that you were going to hear evidence of a very sick young man, and that I hope that by the end of this trial you have some pictures so far as that is humanly possible sitting here in this artificial atmosphere, some pictures of why and how he got this way. Why and how we are here today, why Tom Schiro is sitting there. And, I hope you do, I really do. I hope you can take everything you've heard and use the best, and form some opinions. Take your time, talk it over, and render what you think is a proper verdict. Don't do what I want you to do, or what Mr. Atkinson wants you to do, and don't do what you think other people may want you to do. Bring the verdict with which you feel comfortable. Bring in a verdict which you feel the evidence supports. I would like to thank you for sitting through this and putting up with some of our antics. I'd like to thank you for listening to me.

MR. ATKINSON: I, too, ladies and gentlemen of the jury,

would like to thank you for your patience. Uh, only a couple of very, very brief observations in passing. I have given some thought to whether or not to expose you to one more exhibit, and I've decided that, uh, you just don't have to see it, alright? There's no reason for it. You've seen enough. There are some things I want to point out. Mr. Keating makes an interesting argument that it isn't criminal deviant conduct to do it to somebody after you've killed them. Uh, be that as it may, be that as it may, you are only going to be allowed to return one verdict. I didn't tell you about lesser included offenses, because, quite frankly, the State doesn't believe that this is a lesser included offense. I didn't tell you about the difficulties of making those fine line distinctions because I think this is what you call a gross . . . grossly obvious case. I think guilt has been clearly established . . . I'm sorry, I do not think guilt has been clearly established, I can't share with you my opinions. I think that you will easily find that guilt has been clearly established here. The real question is whether or not Thomas Schiro is legally insane, whether or not he should be relieved from his responsibilities, alright? And, I listened, I listened for an idea from Mr. Keating, and I didn't hear it. The idea is that mere moral or mental depravity is not insanity. It's a holding of the State of Indiana, uh, a holding of the Courts of the State of Indiana, Supreme Court of Indiana, in Goodwin versus State, at 96 Indiana, 550. Think about that. Moral depravity, mere moral or mental depravity is not insanity. That's an old case. That's like eighteen hundred and something. I don't have the right number down there, I don't have any number at all, but it's a very old case. I listened for that idea when Mr. Keating read to you the definition of mental disease or defect. I listened very carefully. I'm sure you did too, and I'm going to read it to you again, just like he did, only I'm not going to stop just where he did. Mental disease or defect is found in Indiana Code 35-41-3-6(a). A person is not responsible for having engaged in prohibited conduct if as a result of mental disease

or defect he lacks substantial capacity, either to appreciate the wrongfulness of the conduct, or . . . that's Mr. Keating's "or", mine too, or to conform his conduct to the requirements of law. Then comes (b). (b) says, mental disease or defect does not include an abnormality manifested only by repeated unlawful or antisocial conduct. That means if this jury finds in dealing with the question of insanity that Thomas Schiro is abnormal, as indeed you may well find, and that his abnormality is found in repeated unlawful or antisocial conduct, that that doesn't qualify for the legal definition of insanity. It's the same idea, mere moral or mental depravity is not a defense. Mere moral depravity, mere antisocial conduct, an abnormality that's found only in repeated unlawful or antisocial conduct is not insanity. It's no defense to this crime. Let Mr. Keating have his argument. You're only allowed to return one verdict. You can't find him guilty of criminal deviant murder. You can . . . and rape, murder, and murder. Let Mr. Keating have his argument. We obviously have proven . . . I'm sorry, I can't do that. You may find that we have obviously proven that there was a rape. You may find that we have obviously proven at this trial that there was a murder and the appropriate charge for you to return a finding of guilty on is murder in the conduct of a rape. There is ample evidence to support that verdict. I want to make one last shot at Mr. Keating. I can't help it. It has to happen. Common sense, it's called. I have an angle on that too. The angle I have is, if you wake up and you're lying there in a pool of your own blood, and you've been assaulted, and you've been unconscious, and the world kind of swims back into focus, and it's the fourth day of February and colder than all "get out" outside, that you don't run naked, screaming into the night, if in the other room, there is passed out, unconscious on the couch in the living room, away from the clothes and away from the writing materials, a person who isn't in control of the situation anymore because he's sleeping or passed out. You put on some shoes to keep from getting

frost bite, you put on somebody's coat, you don't care who, so you don't freeze, and because you love the person that's about to come back to the same house, oh, my God, you write a note. What do you say? I've been raped, but please don't scream, he might wake up? How do you communicate the idea that there is a murderer, maybe, a rapist, certainly, a violent person just inside that door? Or, do you leave your loved one up to the tender mercies of the likes of Mr. Schiro? Common sense, and now comes my angle. You see, the evidence, if you reflect on it, will show that the door that was ajar was the bedroom door. The evidence will reflect . . . it will show, if you reflect on it, that the corner with all of that blood on it, was the corner next to the bedroom door. The evidence, if you reflect upon it Mr. Keating, will show you undoubtedly that the couch is in the living room. That's the angle I have on it. He was passed out and temporarily not a threat and if she'd have been two steps quicker, she'd be alive today, but you know what? She didn't make it, and maybe her tender love and concern for Darlene Hooper in writing that note, cost her her life at the hands of that man who is now trying to avoid responsibility for his conduct the same way he has always tried to do it, by saying, oh, look at me, I'm sick. I need help. I'll be better, I'll be a better little boy. Well, this little boy is a killer.

APPENDIX B

TRANSCRIPT OF FINAL ARGUMENTS AND
INSTRUCTIONS AT THE SENTENCING PHASE

THE COURT: . . . Now, Mr. Atkinson, do you wish to proceed with your summation?

MR. ATKINSON: I would make a very few comments again to the jury. Uh, I think I've told you now on two occasions, it's my style to let the evidence do the talking, that it's not my intention to persuade you to a point of view, but it's rather to allow you to find truth and justice as it exists. The Court will read to you something that I want to emphasize, uh, it's not necessary for us to put on any additional evidence during this stage of the proceeding. You've heard the evidence sufficient in my view to allow you to consider the imposition of the death penalty. The Court will read to you from the case of *Brewer versus State*, found at 417 N.E.2d, 889, a decision by the Supreme Court of the State of Indiana, on March 6, 1981, and will tell you that we don't have a provision for a life sentence in the State of Indiana anymore, and that the range of sentences for murder, if the death penalty is not imposed in this case, as it was in that case, is a fixed sentence of from thirty to sixty years, that being fixed by the Court, not by you, and that one sentenced, including Mr. Schiro in this particular case, could earn credit for good behavior to apply against the sentence, whatever it might be, with a maximum allowable credit of fifty percent of the sentence. That means if the death penalty is not imposed in this case, the range is from thirty to sixty years and the possibility of, of release pursuant to the automatic good time provisions is from fifteen years from the date of sentencing, to thirty years. Some offenses, I believe, and maybe you do too, are so heinous that the perpetrator of the crime, the person who

does those acts, forfeits his right to . . . expect our society to support him for an appreciable portion of the remainder of his life. Surely these offenses are within that category.

MR. KEATING: May it please the Court, Mr. Atkinson, ladies and gentlemen of the jury. I likewise will not talk very long to you. Clarence Darrow, who is, some of you may have heard of, a very well known trial attorney, sometimes [sic] spent up to a day giving final arguments to the jury. I'm not going to do that to you, and I imagine every one of you over the last two days, since you've been home, have been thinking about this, thinking about what's coming up, and maybe in your own mind have even decided what you might do. I ask that you put aside what you've been thinking about for a few minutes, and put it aside until you've discussed it with other members of the jury. The considerations that you have will be three, and the Judge will provide forms of verdict for you for recommendation of the death penalty, recommendation of no death penalty, and for no recommendation. And those are the three considerations that you will have when you go back to the jury room. The alternative to that, as Mr. Atkinson has explained, the alternative to the death penalty in this case, is a prison sentence from thirty to sixty years, at Judge Rosen's discretion, and that if maximum good time is allowed, maximum good time, it could be, actual time done could be cut in half. I want to make one comment to you. That's a load of years. Tom Schiro, I think the evidence shows, is twenty. I think we all can add. That's the alternative to what you have to decide today. The statute again, I'm not going to read the whole thing to you, because the Judge will send it back with you, provides for aggravating circumstances. There is one listed in this case, and one which you may consider. And that one is that the murder was committed, was intentionally committed in the commission of rape and some other things. I assume by your verdict Friday, or

Saturday, that you've probably reached that point; you've probably decided that issue. In finding him guilty of murder in the commission of rape, I'm assuming you've decided beyond a reasonable doubt that it was done in the commission of a rape, and so that aggravating circumstance most likely exists in your mind. But that's the one you may consider. On the other hand, you have to then consider whether or not that fact, that one aggravating circumstance outweighs any mitigating circumstance that may exist, and I'm not going to sit here and go through all possible mitigating circumstances, because I'm sure to miss some. I'm sure you can think of a lot of others. But, I want to talk about just a few, for your consideration, and I'm not limiting what may exist. I want to just limit my time to a few. Number two says that if Defendant was under the influence of extreme mental or emotional disturbance when he committed the murder. Dr. Woods, the Court appointed psychiatrist, when asked, is he mentally ill, replied, Oh yes, without hesitation. The State's own witness, Dr. Crane, I remember, stated that he was a very, extremely disturbed young man. And then we had the evidence from Mary Lee, his girl friend, the evidence from Dr. Osanka. I'm not going to review all that with you. I think all of that shows he was under a very extreme emotional and mental disturbance at the time. I think that mitigating circumstance exists. I think that's something you should consider in determining whether the death penalty is appropriate. Another one is that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired as a result of mental disease, mental defect, or intoxication. Now, I imagine all of you recognize that. That's the insanity definition kind of turned on end with one important factor added. They throw in intoxication. Why is that important? Well, I think the evidence, and you remember it just as well as I do, the evidence showed that every time Tom Schiro went out and did something, did something wrong, he

was drunk, he was high, and to maybe paraphrase Dr. Osanka, his problems, his problems with sex, his problems with drugs, his problems with alcohol, individually, were great, but you put them all together and you have a catastrophe. And I think that's what you can consider here. Throw intoxication into the scheme, on the insanity defense, we're talking about mental disease or defects. Throw in Tom Schiro's mental state, throw into that mental state, alcohol. Throw into that mental state, drugs, and what do you have? I think what you have is a lessened ability to appreciate what you're doing or to control yourself. And in this case, you can consider that as a mitigating circumstance. The last one I want to talk to you about, perhaps at some length, is number seven, and the Judge has read other ones to you which you may consider, but number seven says, any other circumstances appropriate for your consideration. Well, what could those be? Let me suggest just a few things. A lot has been brought out during the trial of this case about how Tom Schiro is avoiding responsibility for what he has done, how he is trying to get out of this, doesn't want to accept responsibility. Well, think about it for a moment. If he had not confessed, if he had kept his mouth shut, if he had not told Ken Hood, if he had not told Mary Lee, ladies and gentlemen, we would not be here. Think back on the evidence. What is there, what was there in that house that linked that murder to Tom Schiro? There was nothing. What was in that car that linked that car to Tom Schiro? One thing only, it was in the general neighborhood of where he was. On the fingerprints, there was nothing discovered that would link it to him. He was not a suspect, Ken Hood told you, at the day he confessed. They had not narrowed it down to him, and I submit to you, they could not have narrowed it down to him. Take away those confessions and you do not have a case. So, what did Tom Schiro do? He turned himself in, in effect. In his own strange way, he turned himself in. He told Mary and he told Ken Hood. As a plea for help, perhaps. As

a plea that, yes, I will accept whatever comes. I hope it is help. I hope somebody can help me. That I am willing to accept whatever happens. He came and said, I did it. Again, in his own strange way, that he did it that way. So, I think you can consider that in deciding whether or not it is appropriate in this case. He has not tried to escape his responsibility. In fact it was his owning up to it and saying he did it that brought him here today before you to determine his fate. And we talked a lot about the, the bad Tom that, I think there was some evidence at trial that maybe there was a good Tom too. Mary Lee was talking about the good Tom, the man who was kind, was affectionate, was loving and was caring, and perhaps it's my fault, perhaps we didn't dwell on that enough. Perhaps all we've done is set here and tried to make the bad Tom known to you and never have taken any attempts to make the good Tom brought out. But, I think there is evidence of a good Tom. There is something in him somewhere, and this something in him somewhere ate at him until he could not take it anymore and he had to tell someone. [sic.] He could not hold this within him. He was not capable of going through his life knowing what he had done, so he stepped forward again, in his own strange way, and said, I did it. Help me. I did it. Do what you may. Another thing I think you can consider is that, while you may blame him, and while he perhaps should be blamed, what happened on February the fifth, a lot of things that led up to the way he was on February the fifth, it would be very cruel indeed to blame him for. What are your memories of six and seven? Are they going to school? Are they maybe a good friend you had in first or second grade? His memories are of watching pornography film. I think there's a direct link between that and what happened. What are your memories of twelve and thirteen? Going down and playing football on the corner lot with your friends? What are his memories? Or what did he do at twelve and thirteen? He was mapping out a route to peep. And, again, how can you, how much blame

can we give to a twelve year old boy? How much blame can we give a six year old boy? As a twenty year old, as a nineteen year old, twenty year old, yes, we can say, Tom, what you did is wrong. But, folks, I think a lot of evidence shows that what he was on that date started a long time ago, and it would be very hard and very, I think, hard hearted indeed to say that we can blame you also for what happened back then when you were young. He's before us today, not only because of what he did on February fifth, at age twenty, but because what he did at six and seven and eight and nine and ten and eleven and twelve and thirteen and fourteen. So I think that's something you can consider. And there's one other, I think appropriate consideration and one more only that I'll talk about. A gentleman by the name of Arthur Koestler, a writer, whom some of you may have heard of, wrote, his most famous book, I think is "Darkness at Noon", but Arthur Koestler himself, was one time under, under penalty of death. Death sentence was suspended and he later escaped that, and in England wrote a series of articles on the English death penalty, which, at that time, was death by hanging. And in speaking of the death penalty and the people who favor it and the people who oppose it, he had this to say, "The division", that is the division between those who favor it and those who oppose, "is not between the rich and the poor, hi-brow and low-brow, Christians and atheists. It is between those who have charity and those who have not. In this age of mass production, charity has come to mean dropping six pence into a box and having a paper flower pinned on one's lapel. But originally it had a different and revolutionary meaning. Though I speak with the tongue of men and angels and have not charity, I am become the sounding brass, or a tinkling cymbal, and though I have all faith, so that I could remove mountains, and have not charity, I am nothing. And though I bestow all my goods to feed the poor, and have not charity, it profit me nothing. Charity, in this ancient meaning of the word, is about the most difficult virtue to acquire,

much more difficult than equity, kindness, or even self sacrifice. The test of one's humanity is whether one is able to accept this fact, not as lip service, but with the shuddering recognition of a kinship. Here, but for the grace of God, drop I." Tom Schiro was not dropped here, delivered here from a space craft, and you wonder why am I talking about that. Tom Schiro started off this life the same way that every one of us did. He had a mother and a father, and he began growing and learning just as we did. Somewhere along the line, somewhere he took a terrible, terrible turn. But here, but for the grace of God, go I, and go us. Here, but for the fact that I had loving parents, or you had loving parents. Here, but for the fact that we had something strong within ourselves that caused us to be able to pull away from temptation when we faced it. Here, but for the fact that we did not have something within us that caused us to seek out erotic satisfaction at every turn. Here, but for the fact that we had older brothers or older sisters who we could model after and see how it was done. Here, but for the grace of God in our growing up, step each one of us. And if you can accept that fact, then I think you have true charity. Now, you say, well, it sounds like you're asking for sympathy for him. What sympathy did he show the victim? Koestler says, "There also exists a kind of pseudo charity, expressed in sayings like, you asked for sympathy for the murderer, but what about the poor victim? The answer is that we sympathize with the victim, but we do not wish to add a second crime to the first. We sympathize with the victim's family, but we do not wish to cause additional suffering to the murderer's family." You have two choices, or three choices here. You can say, yes, Tom, we will not kill you. We will not cause you to be killed, but we will make sure that you will be locked up where you cannot do anything harmful to any members of society for a very long time, and you can say, yes, Mr. and Mrs. Schiro, we will not cause your son to be taken from you, but we will insure that he will not harm anyone for a very, very long time.

If one's looking for an example of caring, I think we saw, one of the most startling examples in this trial, Mary Lee, who's own son was . . . suffered physical and emotional torture and abuse at the hands of Tom Schiro, which she later discovered, was able to say I hate what he has done, but I cannot hate him because he is sick. Someone else said the same thing in a little different form. I think the saying was, hate the sin, but love the sinner. Well, love may be a little bit more than we can ask for today, but charity is not. Charity because Tom Schiro is one of us. Your consideration is whether or not the single aggravating factors [sic] that exist is outweighed by the mitigating factors I have mentioned and the mitigating factors that you may be able to think of. A recommendation of no death penalty in this case, I think, would be a very noble one, I think, one you can be proud of. Sitting there and saying, no, we will not cause a sick person, we will not cause this person to lose his life, but we will protect society. A very noble, a very noble verdict indeed, I think. I ask you, on his behalf, I ask you that that in fact, be your verdict. Thank you.

MR. ATKINSON: I made some notes . . . as the counselor was talking about charity. The difference between having charity and having none, is reflected here. And he hit the nail right on the head. My immediate response, my note to myself was, give him the same charity that he gave to Laura. I guess that's maybe vindictive. I guess maybe that's biblical. I guess maybe that's an eye for an eye and a tooth for a tooth. And I listened to what Mr. Keating had to say about it being cruel of you, cruel of you, to blame Mr. Schiro for the way he was. Well, somewhere along the line I think we need to be reminded that we are all given an effective choice. In this society more than any society anywhere else on earth, we have effective choice. We can be what we choose to be. We can become, here more than anywhere else what we choose to become. What about Mr. Keating's idea of it being cruel to blame Mr. Schiro? Well, Mr. Schiro

chose to beat. Mr. Schiro chose to rape, and Mr. Schiro, as I recall the evidence in this case, chose to kill so he wouldn't be caught. You don't look at the single aggravating circumstance like a little weight placed on one side of the scale. You look at the nature of the aggravating circumstance. You look at how it happened. I submit to you that from the time Mr. Schiro went to the front door, the lady was dead. She had to be because for the first time Mr. Schiro was doing it, what it was that he did, was doing it right across the street from where he worked. There was no other way out from the time he first hit the lady. If he wanted to avoid responsibility, he exercised effective choice and he gave charity . . . well, I don't want to . . . I don't want to belabor what Mr. Keating said. I have a tendency to get a little fired up when I'm responding to argument, and I think you all have heard the evidence and I think that you all probably have given a lot of thought over the last couple of days as to what you're going to be confronted with. The problem here we have is that a sentence for a crime is supposed to fulfill certain purposes. One of the purposes that we have to be fulfilled here is that your sentence should be a deterrent to Mr. Schiro engaging in the same conduct again. The only effective certain deterrent, the only way that you can be sure that sixteen years from now there won't be a repeat performance, is to exercise the ultimate deterrent and make it impossible. Your opinion is just that. You decide and you make a recommendation to the Court. The Court imposes the sentence. If you find that you can't agree among yourselves, the Court will impose some sentence. If you find that the death penalty should be imposed, the Court will impose some sentence, and if you find that the death penalty should not be imposed, the Court will impose some sentence. The ultimate responsibility lies with the Judge. Your opinion is advisory and I guess, I guess that we need to think about the nature of the aggravating circumstance. I do, I do. I think about that. I think of

how this happened. I think of the nature of the attack, the vicious, smashing, biting, nasty, hostile, aggressive, unasked for, unwanted attack; not unlike that of a rabid animal. We all know what we do with rabid animals, and I suspect that that appropriate remedy might be useful here.

THE COURT: I will now proceed with my final instructions. You are instructed that in the event the Defendant, Thomas N. Schiro, is not sentenced to death, he will be sentenced by the Court to a fixed sentence of from thirty years to sixty years, and in that connection I am going to read from the recent case of Brewer against the State, cited in 417 N.E.2d, page 908. There is no longer any provision in our statutes for a life sentence. That the range of sentence for murder if the death penalty was not imposed was a fixed sentence from thirty to sixty years, and that one sentence[d] could earn credit for good behavior to apply against the sentence with a maximum allowable credit of fifty percent of the sentence. The Court further instructs that the sentence could be fixed by the Court and the determination of the jury would not be binding, but would be a recommendation only. And the statement made by counsel that he, with a thirty year sentence for good behavior, there would be a minimum period of fifteen years. With a sixty year sentence, there would be a minimum possible sentence of thirty years. The State is seeking the death penalty in this case by alleging on its Count IIA of its criminal Information, of the existence of aggravating circumstances, and Count II A, Death Sentence, I will read again. The crime of murder as charged in Count II in the information filed herein, was committed by the Defendant, Tom Schiro, Thomas N. Schiro, and the following aggravating circumstances exist which justify the imposition of the death sentence. The murder of Laura Luebbehusen, as charged in Count II, was intentionally committed by the Defendant, Thomas N. Schiro, during the commission of the crime of rape, more particularly described in the Information,

constituting an aggravating circumstance, justifying imposition of the death penalty. The law provides for the death penalty upon conviction for the crime of murder under the following circumstances: the Defendant, one, committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery. You are to consider the following mitigating circumstances: the Defendant has no significant history of prior criminal conduct; two, the Defendant was under the influence of extreme mental or emotional disturbance when he committed the murder; three, the Defendant, the victim was a participant in or consented to the Defendant's conduct. The Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect, or of intoxication. Lastly, any other circumstances appropriate for consideration. You are to consider both aggravating and mitigating circumstances and recommend whether the death penalty should be imposed. You may consider all the evidence introduced at the trial resulting in the Defendant's conviction of murder, together with any new evidence at this hearing. The Court is not bound by your recommendation. If the State fails to prove beyond a reasonable doubt the existence of at least one aggravating circumstance, or if you find that the mitigating circumstances outweigh the aggravating circumstances, you should not recommend the death penalty. If the State did prove beyond a reasonable doubt the existence of one aggravating circumstance and you further find that such aggravating circumstance outweighs any mitigating circumstances, you may recommend that the death penalty be imposed. Now, [the] Court is submitting to you a form of possible recommended verdicts, which you may return in this case. This form will be supplied to you, and I'll give this to the Bailiff when you retire to the jury room for deliberation. The

foreman will preside over your deliberation and must sign and date the recommended verdict, to which you all agree, and which I have provided for all of you to sign. Now, I will read over the three possible verdicts. First, we, the jury recommend the death sentence be imposed upon the Defendant, Thomas N. Schiro. Dated, will be September 15, 1981. Foreperson. And I have eleven other places for signatures. Second, we, the jury recommend that the death penalty not be imposed upon the Defendant, Thomas N. Schiro. Dated, foreperson, and eleven other places for signature. And, lastly, we, the jury, have no recommendation. Dated, foreperson, and eleven other places. The Bailiff has heretofore been sworn to take care and feed and guard you and not to have anything interrupt. I will give you this proposed three verdicts, and I will give you the final charge, instruction as to the death penalty, which I have indicated. You may retire and when you are ready you may knock on the door and inform the Bailiff. The alternate juror may rest here.

(JURY LEAVES THE COURTROOM AT 1:47 P.M. FOR DELIBERATION AND RETURNS THEIR VERDICT AT 2:48 P.M.)